Mkini Dotcom Sdn Bhd & Ors v Raub Australian Gold Mining Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-61–08 OF 2018(W)
VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF, HASNAH HASHIM AND HARMINDAR SINGH FCJJ
2 JULY 2021

Tort — Defamation — Defences — Whether defence of reportage had to be specifically pleaded if defendant wanted to rely upon it — Whether reportage could not be pleaded as alternative to Reynolds defence of responsible journalism ('Reynolds defence') or vice-versa — Whether apart from fact that both were 'public interest' defences, reportage differed completely from Reynolds defence — Whether Reynolds defence was concerned with whether steps had been taken by journalist to verify the truth and accuracy of any allegation he had reported whereas reportage was concerned with whether the defamatory material had been reported in a detached but fair, disinterested and neutral manner without embellishment or opinion

The first appellant owned and operated an online news portal known as Malaysiakini. The other three appellants were, at the material time, respectively, Malaysiakini's assistant news editor, its senior journalist and its videographer while the respondent was, at the time, operating a gold mine in Bukit Koman in the district of Raub, Pahang. The respondent sued the appellants for, inter alia, defamation for publishing three articles and two videos on Malaysiakini alleging that its use of cyanide in its gold mining activities had caused various health issues among the villagers in Bukit Koman and had so polluted the environment that even birds and vegetation had died. The respondent alleged that the contents of the articles and videos were false and were intended to injure its reputation, trade and business. The appellants, on the other hand, contended that the articles and videos were not defamatory of the respondent but concerned matters of public interest which the appellants were under a duty, at least a moral one, to publish. The appellants relied on the defences of qualified privilege, fair comment and the right to freedom of expression and said they had exercised responsible journalism. Following a trial, the High Court dismissed the defamation claim after finding that although the appellants' publications were defamatory of the respondent, they were protected by the *Reynolds* defence of responsible journalism ('the *Reynolds* defence') as well as the defence of reportage. The trial judge found from the evidence that the respondent's use of sodium cyanide in its plant was not the cause of any environmental pollution or the supposed illnesses suffered by the residents of Bukit Koman; rather, their troubles were caused by the use

of herbicides. The trial judge held that the appellants had shown that the matters they reported were of public interest and that they had taken responsible and fair steps to gather, verify and publish the information. The judge found that the very first article by the appellants merely reported the concern of the villagers as to their health and their suspicion that the environmental pollution might have been caused by the respondent; that the article made no allegations or criticisms against the respondent nor contained embellishments by the appellants. The judge held that the fact that the appellants had contacted the chairman of the residents' Ban Cyanide Action Committee ('BCAC') before publishing the first article was sufficient to constitute responsible journalism. As for the second and third articles and the two videos linked to them, the trial judge found that they were mere reproductions of two press conferences called by BCAC which various news media, including the appellants, were invited to attend. The judge found that the appellants had merely reported what took place at the press conferences without adopting the contents of those articles and videos as their own or embellishing them. Although the appellants did not specifically plead the defence of reportage, the trial judge held that that defence was 'one form of the *Reynolds* privilege' and was considered as 'part of the qualified privilege defence' and that since the appellants had pleaded qualified privilege, it was 'sufficient to enable them to prove reportage at the trial'. On the whole, the trial judge found that the articles and videos were published in a fair, disinterested and neutral manner and that the appellants did not adopt the allegations contained in them as their own.

The Court of Appeal ('COA'), however, reversed the dismissal of the defamation claim and awarded the respondent RM200,000 in general damages for loss of goodwill and vindication of its reputation. In summary, the COA held that: (a) the appellants could not avail of the defence of responsible journalism because they had not satisfied the ten-point test propounded in *Reynolds*; (b) the allegations made against the respondent were not reported in a fair, disinterested and neutral manner but was one-sided and slanted against the respondent; (c) the appellants had embellished the allegations against the respondent and adopted them as the truth without checking their veracity with other independent experts or contacting the respondent to get its side of the story; (d) the defence of reportage was not available to the appellants because it was not specifically pleaded; and (e) merely pleading qualified privilege or the *Reynolds* defence was insufficient to allow the appellants to rely upon the defence of reportage.

The Federal Court granted the appellants leave to appeal against the COA's decision on nine questions of law. In summary, they were: (i) whether reportage was a separate defence from qualified privilege or the *Reynolds* defence and had to be separately pleaded; (ii) whether a defendant had to plead either reportage or responsible journalism and could not plead either of them as an alternative to the other; (iii) whether the averment that the impugned publications were matters of public interest which the defendants were under a duty to publish

was a sufficient pleading of reportage; (iv) whether the mere publishing of video recordings of statements made by third parties in a press conference could be held to be an embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media; (v) whether in determining the defence of reportage, the impugned publications should be considered together with previous and continuing publications of the news media on the same subject matter; (vi) whether the proper test to determine if the defence of reportage succeeded or not was the test of adoption by the journalist of the publications as true and not for the journalist to establish his neutrality by independent verification; (vii) whether it was proper to award general damages for loss of goodwill and vindication of reputation to a company that had been voluntarily wound up; and (viii) whether such a company could recover loss of goodwill as a component of defamatory damages.

Held, by majority, dismissing the appeal and affirming the COA's decision:

(1) **(per Abdul Rahman Sebli FCJ, majority)** As a matter of doctrine and principle, the defence of reportage could not be reconciled as part of the *Reynolds* defence of responsible journalism ('*Reynolds* defence') or qualified privilege. The gulf between the two defences was too wide to be abridged as defences of the same specie. In the *Reynolds* defence, the focus was on whether the journalist had taken reasonable steps to verify the truth and accuracy of any allegation he had reported. In contrast, reportage was not concerned with the truth and accuracy of the defamatory allegations but with the narrower public interest of knowing that the allegations were in fact made and whether the journalist had reported them in a detached but fair, disinterested and neutral way. Neutral reporting was the single most important element in reportage whereas it was not an element in the *Reynolds* defence. Given the difference between the two, it was entirely contradictory that a defence that was unconcerned with the truth and accuracy of the allegations could be regarded as part of the *Reynolds* defence which was concerned with the exact opposite. They were, in that sense, opposite ends of the pole; the only meeting point between the two was that they were both public interest defences (see paras 20–22, 25 & 63).

(2) **(per Abdul Rahman Sebli FCJ, majority)** As the defence of reportage and the *Reynolds* defence were mutually exclusive, they could not be pleaded in the alternative to each other. The trial judge wrongly regarded the two defences as one and the same and had also failed to consider whether the appellants had met the ten factors propounded in *Reynolds* in determining whether the defence of reportage had been made out. All ten factors listed in *Reynolds* had to be considered, with the necessary adjustments, for the 'special nature' of reportage (see paras 27, 35, 55–57 & 88).

(3) **(per Abdul Rahman Sebli FCJ, majority)** Apart from pleading fair comment and the constitutional right to freedom of expression, the appellants only pleaded the *Reynolds* defence but not reportage or the material facts relating to that defence. Other than the element of public interest, none of the other characteristics of reportage were pleaded, in particular, the element of neutrality and the element of not subscribing to a belief in the truth of the imputations. These were material facts the appellants ought to have pleaded if they wanted to rely on reportage as a defence. Reportage could not be implied from the pleadings, yet the appellants relied heavily upon it in their closing submissions at trial. Reportage had to be pleaded so that the opposing party was not taken by surprise if it was only raised in the closing submissions. The trial judge was wrong to have accepted the defence of reportage when it was not pleaded (see paras 28, 30–31, 38, 43 & 45).

(4) **(per Abdul Rahman Sebli FCJ, majority)** The statement of defence read in its entirety ran counter to the core principle behind the defence of reportage when the appellants adopted the defamatory statements in the articles and videos as their own instead of simply reporting them in a neutral fashion. From the pleadings and the contents of the impugned publications, it was obvious that the appellants had, in breach of the reportage rule, subscribed to a belief in the truth and accuracy of the defamatory imputations. There was no averment in the statement of defence denying that they had subscribed to such a belief and that they were simply reporting in a neutral fashion. A vital element of reportage was therefore missing from the pleadings to entitle the appellants to rely on that defence (see paras 44 & 48).

(5) **(per Abdul Rahman Sebli FCJ, majority)** The appellants took a position in favour of the BCAC in their reporting which negated any assertion on their part that they had been fair, disinterested and neutral. Their reporting implied that the defamatory statements made by the BCAC were true and accurate when they were not. The articles and videos bore an accusatory tone which leaned in favour of giving wide coverage to opposition politicians and the BCAC's unverified and false assertions. That alone disentitled the appellants to the protection of reportage. Taken objectively and from the standpoint of a reasonable and neutral bystander, the tone of the appellants' articles and videos was accusatory, damaging and disparaging (see paras 67–68 & 72).

(6) **(per Abdul Rahman Sebli FCJ, majority)** The publisher who sought the protection of reportage as a defence had to make it clear that he did not himself believe the information to be true. The appellants did not make their position clear both in their statement of defence and in their evidence in court. Silence was not an option where the statements were defamatory, derogatory and accusatory of the claimant. If the journalist

espoused or concurred with the defamatory statements or imputations, he lost the protection of reportage. Espousing or concurring with the defamatory material need not be express but could be implied, for example, by using headlines that promoted and gave prominence to the defamatory statements or imputations, taking into account the tendency of the general public to read only the headlines (see paras 70–71).

(7) **(per Abdul Rahman Sebli FCJ, majority)** The second limb of the *Reynolds* defence or qualified privilege required the appellants to satisfy the court that the steps to gather, verify and publish the information were responsible and fair. However, from the evidence of the appellants' witnesses, it was clear that the appellants had failed to take steps, let alone reasonable steps, to verify the contents of the articles and videos. On the proved facts, the trial judge was wrong in finding that the articles and videos were published on an occasion of qualified privilege (see paras 80–83).

(8) **(per Abdul Rahman Sebli FCJ, majority)** It was established law that a company could recover general damages for loss of goodwill and vindication of reputation without having to prove actual loss. It was the respondent's status at the time of the filing of the writ that was material. In any case, since the appellants did not raise any argument in the COA as to the respondent's financial standing or that it was in the process of a voluntary winding up as a basis for saying that the respondent did not have a good reputation and/or was disentitled to general damages, they must be precluded from raising such argument in the instant appeal (see para 95).

(9) **(per Harmindar Singh FCJ, dissenting)** Reportage was not a distinct and separate defence from responsible journalism or qualified privilege generally. It was part of the *Reynolds* family of public interest privilege or responsible journalism. It was not a defence *sui generis*, as underpinning both defences was the public policy of the duty to impart and receive information, as reflected in the leading cases on reportage (see para 156).

(10) **(per Harmindar Singh FCJ, dissenting)** The COA erred in its approach and in the reasons it gave for differing from the trial judge and in setting aside the High Court's decision. The trial court was entitled to come to the finding that in respect of the first article, responsible journalism had been established and in respect of the other two articles and their related videos, the appellants were entitled to avail of the defence of reportage. The impugned publications, although damaging to the respondent, were on a matter of great public concern and were balanced in content and tone, and critically, did not assert the truth of the allegations reported (see para 199).

(11) **(per Harmindar Singh FCJ, dissenting)** The trial court had the

considerable advantage of having heard all the evidence through various witnesses over a period of time compared to the COA which only had the benefit of the cold print of the appeal records. In such a case, an appellate court ought to only disagree with the trial judge's assessment if the judge had misunderstood the evidence, taken into account irrelevant factors or failed to take into account relevant factors or had reached a conclusion no reasonable judge would have reached. In the present case, there were really no grounds for appellate intervention both in law and in fact (see para 200).

(12) **(per Harmindar Singh FCJ, dissenting)** *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750 ('Charman') did not rule (as the COA appeared to have accepted) that the defence of reportage and the *Reynolds* defence could not be run as alternative defences. In fact, *Charman* was recognised as authority for the proposition that where a defendant failed to maintain a neutral stance and therefore lost the privilege of reportage, he/she might still avail of the *Reynolds* defence more generally by proving responsible journalism. Sedley LJ's remark in *Charman* that pleaders might need to decide between pleading reportage or responsible journalism — because once reportage was relied upon it was forensically problematical to fall upon an alternative defence of responsible journalism — was obiter. The court there dealt with the defence of reportage first and after rejecting it, upheld the *Reynolds* defence on finding the publication to be a piece of responsible journalism (see paras 160–162).

(13) **(per Harmindar Singh FCJ, dissenting)** The appellants in the instant case had pleaded qualified privilege by making specific references to 'responsible journalism' and 'public interest' and to their having 'a duty to publish' the ongoing story. Any plaintiff, properly advised, would have been in no doubt that the defence of reportage was also being pleaded especially when the terms 'public interest privilege' or 'responsible journalism' were used. The law of pleadings did not require the actual legal term to be used if the facts and circumstances warranting the defence were set out. It was only necessary to plead the material facts and not the legal result. Pleadings were to put the opposing party on notice as to one's case so as to promote fair and efficient litigation. If there was any doubt, parties were at liberty to seek further and better particulars. In the circumstances, it was not open to the respondent to claim surprise or prejudice on the pleading issue. The trial court was quite right to hold that reportage had been sufficiently pleaded (see paras 163–165).
The COA's decision was unsustainable for the following reasons:

(14) **(per Harmindar Singh FCJ, dissenting)** The COA found that the appellants could not rely on the defence of responsible journalism because they failed to meet the ten-points test propounded in *Reynolds*.

A The trial court's judgment, however, showed that the trial judge had considered the ten points to be a critical issue but had considered, quite correctly, that they were merely illustrative and a general guideline. The trial judge had also correctly found that the first article was only about the concerns of the residents and not whether their suspicions were true. B Reading the article as a whole, there appeared to be no adoption or embellishment by the appellants. The trial court's finding of responsible journalism in respect of the first article was therefore unassailable and the COA was wrong to have interfered with that finding (see paras 178–179, 181 & 183).

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(15) **(per Harmindar Singh FCJ, dissenting)** The COA wrongly interfered with the trial court's findings with respect to the second and third articles and the two related videos by holding that the appellants' failure to verify the truth of the allegations denied them of the protection of the *Reynolds* D privilege as well as the defence of reportage. The COA found that the appellants did not give the respondent an opportunity to respond to the allegations and also did not seek verification of the allegations from independent experts. With respect to the former, the trial court found that attempts were made by the appellants to contact the respondent for E a response but the respondent declined to comment. The COA did not advert to any of these facts as found by the trial court. As for getting the verification of experts, in cases of reportage, as long as there was no adoption and the defendant had engaged in neutral reporting, there was no requirement to verify the truth of the allegations of an ongoing F dispute. Since the appellants had sought the comments of the then Chairman of the BCAC (who confirmed the fears of the residents), the respondent (from whom no comments were forthcoming), a Federal Minister and local Parliamentarian Ng Yen Yen (who remarked that the gold mine was safe) and the State's Local Government, Environment and G Health Committee Chairperson Hoh Khai Mun (who told the State Assembly that the water was cyanide-free and that the presence of toxic chemicals in the air was within limits), it was fair and reasonable to conclude that the impugned articles and videos were an accurate, balanced and neutral account of the dispute (see paras 184–190).

H (16) **(per Harmindar Singh FCJ, dissenting)** If any verification exercise was required to establish that the publisher or journalist had acted responsibly, it should not be burdensome or time-consuming such that the urgency of the story was lost. As news was a perishable commodity, the urgency of a story was a factor to be taken into account especially in I respect of an on-going story of public interest. It was unreasonable to expect a newspaper to verify with independent experts or engage its own experts before publishing a developing story of daily interest. The issues concerning the respondent's activities were widely reported by other news media even before the appellants' publications came out; hence to impose

the burden on the appellants to verify with independent experts before reporting was onerous and impractical. In deciding whether or not the criterion of responsible journalism had been met, the court should apply the standard of conduct expected of a journalist in a practical and flexible manner. The COA's decision to decide against the appellants on the ground that they had not verified the truth of the allegations with independent experts before publishing was inimical to the spirit of the ten-points in *Reynolds* as the ten points ought not to be treated as ten hurdles that had to be surmounted failing which the defence would fail (see paras 191–194).

(17) **(per Harmindar Singh FCJ, dissenting)** A plain reading of the impugned articles and the tone adopted therein did not justify the COA's view that the articles were 'not fair and neutral', that the appellants had 'garnished and embellished' the allegations, that they were couched in a 'sarcastic' or 'accusatory and damaging tone' or that the appellants had 'embraced and adopted' the complaints as the truth. Allegedly defamatory words had to be objectively assessed and not through the eyes of the complaining plaintiff or the meaning the plaintiff gave to the words. The reportage defence was only lost by embellishment by the journalist adding his comments to give truth to the story. The COA had also remarked that the impugned articles asserted something sinister and were biased against the respondent. The trial court, however, found no malice on the part of the appellants and there was no reversal of this finding on appeal (see paras 195–198).

[Bahasa Malaysia summary

Perayu pertama memiliki dan menjalankan operasi portal berita atas talian dikenali sebagai Malaysiakini. Tiga perayu lain adalah, pada masa matan, masing-masingnya, pembantu editor berita, wartawan kanannya dan juruvideonya sementara responden pada masa itu mengusahakan lombong emas di Bukit Koman di daerah Raub, Pahang. Responden menyaman perayu untuk, antara lain, fitnah kerana menerbitkan tiga artikel dan dua video dalam Malaysiakini yang mendakwa bahawa penggunaan sianida (*cyanide*) dalam aktiviti perlombongan emasnya telah menyebabkan pelbagai masalah kesihatan di kalangan penduduk di Bukit Koman dan telah mencemarkan alam sekitar sehingga burung dan tumbuh-tumbuhan telah mati. Responden mendakwa bahawa kandungan artikel dan video itu palsu dan bertujuan untuk menjejaskan reputasi, perdagangan dan perniagaannya. Sebaliknya, perayu berpendapat bahawa artikel dan video tersebut tidak memfitnah responden tetapi berkaitan perkara-perkara kepentingan awam, sekurang-kurangnya dari segi moral, yang perlu diterbitkan oleh perayu. Perayu-perayu bergantung kepada pembelaan perlindungan bersyarat, komen yang adil dan hak kebebasan bersuara dan mengatakan mereka telah menjalankan kewartawanan yang bertanggungjawab. Berikutan satu perbicaraan, Mahkamah Tinggi telah

menolak tuntutan fitnah itu setelah mendapati bahawa walaupun penerbitan perayu adalah bersifat fitnah terhadap responden, mereka dilindungi oleh pembelaan *Reynolds* terhadap kewartawanan yang bertanggungjawab ('pembelaan *Reynolds*') serta pembelaan pemberitaan. Hakim perbicaraan mendapati berdasarkan keterangan bahawa penggunaan natrium sianida responden di kilangnya bukan penyebab pencemaran alam sekitar atau penyakit yang dihidapi oleh penduduk Bukit Koman; sebaliknya, masalah mereka disebabkan oleh penggunaan racun rumpai. Hakim perbicaraan berpendapat bahawa perayu telah menunjukkan bahawa perkara yang mereka laporkan adalah demi kepentingan awam dan bahawa mereka telah mengambil langkah yang bertanggungjawab dan adil untuk mengumpulkan, mengesahkan dan menerbitkan maklumat tersebut. Hakim mendapati bahawa artikel pertama perayu-perayu hanya melaporkan keprihatinan penduduk kampung terhadap kesihatan mereka dan kecurigaan mereka tentang pencemaran alam sekitar yang mungkin disebabkan oleh responden; bahawa artikel itu tidak membuat tuduhan atau kritikan terhadap responden dan juga tidak mengandungi tambahan oleh perayu. Hakim berpendapat hakikat bahawa perayu telah menghubungi pengerusi Jawatankuasa Tindakan Sianid Ban ('BCAC') penduduk sebelum menerbitkan artikel pertama itu sudah cukup untuk membentuk kewartawanan yang bertanggungjawab. Berhubung artikel kedua dan ketiga dan dua video yang dikaitkan dengannya, hakim perbicaraan mendapati bahawa itu hanyalah gambaran semula daripada dua sidang media yang dipanggil oleh BCAC yang diundang oleh pelbagai media berita, termasuk perayu-perayu. Hakim mendapati bahawa perayu-perayu hanya melaporkan apa yang berlaku pada sidang media tersebut tanpa mengguna pakai kandungan artikel dan video tersebut sebagai milik mereka atau menambahnya. Walaupun perayu-perayu tidak secara khusus mengemukakan pembelaan untuk laporan, hakim perbicaraan berpendapat bahawa pembelaan itu adalah 'one form of the *Reynolds* privilege' dan dianggap sebagai 'part of the qualified privilege defence' dan oleh kerana perayu-perayu telah mempli perlindungan bersyarat, ia adalah 'sufficient to enable them to prove reportage at the trial'. Pada keseluruhannya, hakim perbicaraan itu mendapati bahawa artikel dan video itu telah diterbitkan secara adil, tiada kepentingan dan berkecuali dan bahawa perayu-perayu tidak mengguna pakai tuduhan yang terkandung dalamnya sebagai milik mereka.

Mahkamah Rayuan ('MR'), bagaimanapun, telah mengakas penolakan tuntutan fitnah itu dan mengawardkan responden RM200,000 sebagai ganti rugi am kerana kehilangan nama baik dan usaha mempertahankan reputasinya. Secara ringkas, MR memutuskan bahawa: (a) perayu-perayu tidak berjaya untuk pembelaan kewartawanan yang bertanggungjawab kerana mereka tidak memenuhi ujian sepuluh poin yang dikemukakan dalam *Reynolds*; (b) tuduhan yang dibuat terhadap responden tidak dilaporkan dalam cara yang adil, tiada kepentingan dan neutral tetapi berat sebelah dan cenderung kepada responden; (c) perayu-perayu telah menokok tambah tuduhan terhadap responden dan mengguna pakainya sebagai suatu yang

benar tanpa memeriksa kebenarannya dengan pakar bebas yang lain atau menghubungi responden untuk mendapat versi kisahnya pula; (d) pembelaan untuk laporan tidak tersedia kepada perayu-perayu kerana ia tidak dipli secara khusus; (e) hanya mempli perlindungan bersyarat atau pembelaan *Reynolds* adalah tidak mencukupi untuk membenarkan perayu-perayu bergantung kepada perlindungan untuk pelaporan.

Mahkamah Persekutuan memberikan perayu-perayu kebenaran untuk merayu terhadap keputusan MR berhubung sembilan persoalan undang-undang. Secara ringkas, ianya adalah: (i) sama ada laporan adalah satu pembelaan berasingan daripada perlindungan bersyarat atau pembelaan *Reynolds* dan perlu dipli secara berasingan; (ii) sama ada defendan perlu mempli sama ada laporan atau kewartawanan yang bertanggungjawab dan tidak boleh mempli salah satu daripadanya sebagai alternatif kepada yang lain; (iii) sama ada penegasan bahawa penerbitan yang dipersoalkan merupakan perkara-perkara mengenai kepentingan awam yang mana defendan mempunyai kewajipan untuk menerbitkannya adalah suatu pliding laporan yang mencukupi; (iv) sama ada hanya dengan menerbitkan rakaman video tentang kenyataan yang dibuat oleh pihak ketiga dalam sidang media boleh dianggap sebagai menokok tambah tuduhan atau mengambil atau mengguna pakai kenyataan tersebut sebagai suatu yang benar oleh media berita; (v) sama ada dalam menentukan pembelaan untuk laporan, penerbitan yang dipersoalkan patut dipertimbangkan bersama dengan penerbitan media berita yang terdahulu dan berterusan berhubung hal perkara yang sama; (vi) sama ada ujian wajar untuk menentukan jika pembelaan untuk laporan berjaya atau tidak adalah dengan ujian guna pakai oleh wartawan penerbitan sebagai benar dan bukan utuk wartawan membuktikan sikap neutralnya dengan pengesahan sendiri; (vii) sama ada ia wajar untuk memberi award ganti rugi am bagi kehilangan nama baik dan usaha mempertahankan reputasi kepada syarikat yang telahpun digulungkan secara suka rela; dan (viii) sama ada syarikat tersebut boleh mendapat balik kehilangan nama baik sebagai kompoten ganti rugi berunsur fitnah.

Diputuskan, melalui majoriti, menolak rayuan dan mengesahkan keputusan MR:

(1) **(oleh Abdul Rahman Sebli HMP, majoriti)** Sebagai suatu perkara berhubung doktrin dan prinsip, pembelaan untuk laporan tidak dapat disatukan sebagai sebahagian daripada pembelaan *Reynolds* untuk kewartawanan yang bertanggung jawab ('pembelaan *Reynolds*') atau perlindungan bersyarat. Jurang antara kedua-dua pembelaan itu terlalu luas untuk disatukan sebagai pembelaan daripada spesies yang sama. Dalam pembelaan *Reynolds*, fokusnya adalah tentang sama ada wartawan itu telah mengambil langkah yang munasabah untuk mengesahkan kebenaran dan ketepatan apa-apa tuduhan yang dia laporkan. Sebaliknya, laporan tidak mementingkan kebenaran dan ketepatan

tuduhan fitnah itu tetapi dengan kepentingan umum yang semakin sempit untuk mengetahui bahawa tuduhan tersebut sebenarnya dibuat dan sama ada wartawan tersebut melaporkannya dengan cara yang terasing tetapi adil, tiada kepentingan dan berkecuali. Pelaporan berkecuali adalah satu-satunya elemen penting dalam laporan manakala ia bukan ssatu elemen dalam pembelaan *Reynolds*. Berdasarkan perbezaan antara kedua-duanya, ia adalah sama sekali bertentangan bahawa pembelaan yang tidak berkaitan dengan kebenaran dan ketepatan tuduhan dapat dianggap sebagai seahagian dari pembelaan *Reynolds* yang berkenaan dengan sebaliknya. Kedua-duaya, dalam erti kata itu, mempunyai perbezaan yang nyata; satu-satunya titik pertemuan antara keduanya adalah kedua-duanya adalah pembelaan demi kepentingan awam (lihat perenggan 20–22, 25 & 63).

(2) **(oleh Abdul Rahman Sebli HMP, majoriti)** Oleh kerana pembelaan laporan dan pembelaan *Reynolds* saling eksklusif, kedua-duanya tidak boleh dipli sebagai alternatif antara satu sama lain. Hakim perbicaraan terkhilaf keran menganggap dua pembelaan tersebut sebagai satu dan sama dan juga telah gagal mengambil kira sama ada perayu-perayu telah memenuhi sepuluh faktor yang dikemukakan dalam *Reynolds* untuk menentukan sama ada pembelaan untuk laporan telah dibuktikan. Kesemua sepuluh faktor yang tersenarai dalam *Reynolds* hendaklah diambil kira, enggan pengubahsuaian, untuk 'sidat istimewa' laporan (lihat perenggan 27, 35, 55–57 & 88).

(3) **(oleh Abdul Rahman Sebli HMP, majoriti)** Selain daripada pliding komen adil dan hak perlembagaan untuk bebas bersuara, perayu-perayu hanya mempli pembelaan *Reynolds* tetapi bukan untuk laporan atau fakta material berkaitan pembelaan tersebut. Selain daripada elemen kepentingan awam, tiada apa-apa ciri lain untuk laporan yang telah diplikan, terutamanya, elemen berkecuali dan elemen untuk tidak berpegang pada kepercayaan akan kebenaran tohmahan. Ini adalah fakta material yang patut dipli oleh perayu-perayu sekiranya mereka mahu bergantung kepada laporan sebagai pembelaan. Laporan tidak dapat disiratkan daripada pliding tersebut, namun perayu-perayu sangat bergantung pada laporan itu dalam penutup hujah mereka semasa perbicaraan. Laporan perlu dipli agar pihak lawan tidak terkejut jika ia hanya dibangkitkan dalam laporan penutup. Hakim perbicaraan telah terkhilaf kerana menerima pembelaan laporan walhal ia tidak dipli (lihat perenggan 18, 30-31, 38, 43 & 45).

(4) **(oleh Abdul Rahman Sebli HMP, majoriti)** Penyataan pembelaan dibaca secara menyeluruh bertentangan dengan prinsip utama pembelaan untuk laporan apabila perayu-perayu mengguna pakai penyataan berunsur fitnah dalam artikel dan video sebagai milik mereka dan bukannya sekadar melaporkannya dalam keadaan yang berkecuali.

Berdasarkan pliding dan kandungan penerbitan yang dipersoalkan, ia adalah jelas bahawa perayu-perayu telah, melanggar peraturan laporan, dengan mempercayai kebenaran dan ketepatan fitnah yang disangkakan. Tiada penegasan dalam penyataan pembelaan yang menafikan bahawa mereka mempunyai kepercayaan seperti itu dan bahawa mereka hanya melaporkan secara berkecuali. Oleh itu, elemen penting dalam laporan telah lenyap daripada pliding itu untuk memberi hak kepada perayu untuk bergantung pada pembelaan tersebut (lihat peranggan 44 & 48).

(5) **(oleh Abdul Rahman Sebli HMP, majoriti)** Perayu-perayu mengambil kedudukan untuk menyebelahi BCAC dalam pelaporan mereka yang menafikan apa-apa penegasan di pihak mereka bahawa mereka telah bersikap adil, tiada kepentingan dan berkecuali. Pelaporan mereka secara tersirat menyatakan bahawa kenyataan berunsur fitnah yang dibuat oleh BCAC adalah benar dan tepat walhal ia tidak begitu. Artikel dan video itu mempunyai nada menuduh yang lebih cenderung memberi liputan luas kepada ahli-ahli politik pembangkang dan penegasan BCAC yang tidak disahkan dan palsu. Itu sendiri tidak melayakkan perayu-perayu untuk mendapat perlindungan untuk laporan. Jika diambil secara objektif dan dari sudut pandang pemerhati yang munasabah dan berkecuali, nada artikel dan video perayu adalah bersifat menuduh, merosakkan dan menghina (lihat perenggan 67–68 & 72).

(6) **(oleh Abdul Rahman Sebli HMP, majoriti)** Penerbit yang memohon hak istimewa untuk melapor sebagai pembelaan hendaklah menyatakan dengan jelas bahawa dia sendiri tidak mempercayai maklumat itu benar. Perayu-perayu tidak menyatakan kedudukan mereka dengan jelas dalam kedua-dua penyataan pembelaan dan dalam keterangan mereka di mahkamah. Berdiam diri bukan suatu pilihan di mana kenyataan itu berunsur memfitnah, menghina dan menuduh penuntut. Jika wartawan menyokong atau menyetujui kenyataan atau sangkaan berunsur fitnah itu, dia kehilangan hak istimewa untuk melapor itu. Dengan menyokong atau menyetujui dengan bahan berunsur fitnah itu tidak perlu dinyatakan dengan jelas tetapi dapat disiratkan, misalnya, dengan menggunakan tajuk utama yang mempromosikan dan memberi penekanan kepada kenyataan dan sangkaan berunsur fitnah itu, dengan mempertimbangkan kecenderungan masyarakat umum yang hanya akan membaca tajuk utama (lihat perenggan 70–71).

(7) **(oleh Abdul Rahman Sebli HMP, majoriti)** Cabang kedua pembelaan *Reynolds* atau perlindungan bersyarat menghendaki perayu-perayu meyakinkan mahkamah bahawa langkah-langkah untuk mengumpul, mengesahkan dan menerbitkan maklumat tersebut adalah dengan sikap bertanggungjawab dan adil. Walau bagaimana pun, berdasarkan keterangan saksi-saksi perayu-perayu, ia jelas bahawa perayu-perayu telah gagal untuk mengambil langkah-langkah tersebut, apakah lagi

A langkah-langkah munasabah untuk megesahkan kandungan artikel dan video itu. Berdasarkan fakta yang dibuktikan, hakim mahkamah telah terkhilaf kerana mendapati bahawa artikel dan video itu telah diterbitkan atas perlindungan bersyarat (lihat perenggan 80–83).

B (8) **(oleh Abdul Rahman Sebli HMP, majoriti)** Adalah undang-undang tetap bahawa suatu syarikat boleh mendapat balik ganti rugi am untuk kehilangan nama baik dan reputasi terjejas tanpa perlu membuktikan kehilangan sebenar. Ia adalah statut responden pada masa memfailkan writ yang penting dan material. Dalam apa keadaan, oleh kerana C perayu-perayu tidak menimbulkan apa-apa hujah di MR berhubung kedudukan kewangan responden atau bahawa ia dalam proses penggulungan suka rela sebagai asas untuk mengatakan bahawa responden tidak mempunyai reputasi baik dan/atau tidak berhak untuk mendapat ganti rugi am, ia patut dihalang daripada menimbulkan hujah D sedemikian dalam rayuan ini (lihat perenggan 95).

(9) **(oleh Harmindar Singh HMP, menentang)** Laporan bukan satu pembelaan yang berbeza dan berasingan daripada tanggungjawab kewartawanan atau perlindungan bersyarat secara amnya. Ia adalah sebahagian daripada elemen *Reynolds* untuk perlindungan demi E kepentingan awam atau kewartawanan yang bertanggungjawab. Ia bukan pembelaan *sui generis*, kerana asas kedua-dua pembelaan adalah dasar awam berhubung kewajipan untuk memberi dan menerima maklumat, sebagaimana dinyatakan dalam kes-kes utama dalam laporan (lihat perenggan 156).

F (10) **(oleh Harmindar Singh HMP, menentang)** MR terkhilaf dalam pendekatannya dan dalam alasan yang diberikannya kerana berbeza daripada hakim perbicaraan dan dalam mengetepikan keputusan Mahkamah Tinggi. Mahkamah perbicaraan berhak untuk membuat G dapatan bahawa berkaitan artikel pertama, kewartawanan yang bertanggungjawab hendaklah dibuktikan dan berkaitan dua artikel lain dan video yang berkaitan, perayu-perayu berhak untuk memanfaatkan pembelaan untuk laporan. Penerbitan yang dipersoalkan, meskipun mejejaskan responden, adalah suatu perkara yang menjadi perhatian H umum dan diimbangi dalam kandungan dan nada, dan secara kritikal, tidak menegaskan kebenaran tuduhan-tuduhan yang dilaporkan (lihat perenggan 199).

(11) **(oleh Harmindar Singh HMP, menentang)** Mahkamah perbicaraan mempunyai kelebihan yang cukup besar untuk mendengar semua I keterangan melalui pelbagai saksi-saksi dalam jangka masa tertentu berbanding dengan MR yang hanya mempunyai manfaat daripada cetakan rekod-rekod rayuan. Dalam keadaan sedemikian, mahkamah rayuan patut hanya tidak bersetuju dengan penegasan hakim perbicaraaan jika hakim salah faham keterangan itu, dengan mengambil

kira faktor-faktor tidak relevan atau telah gagal mengambil kira faktor-faktor relevan atau telah mencapai satu kesimpulan yang mungkin tidak dicapai oleh hakim yang munasabah. Dalam kes ini, sememangnya tiada alasan untuk campur tangan rayuan dari segi undang-undang dan fakta (lihat perenggan 200).

(12) **(oleh Harmindar Singh HMP, menentang)** Kes *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750 ('Charman') tidak memutuskan (kerana MR nampaknya telah menerima) bahawa pembelaan untuk laporan dan pembelaan *Reynolds* tidak boleh dianggap sebagai pembelaan alternatif. Bahkan, *Charman* diiktiraf sebagai autoriti untuk kerana anggapan bahawa di mana seorang defendan gagal mengekalkan sikap berkecuali dan dengan itu kehilangan hak istimewa untuk melapor, dia mungkin masih dapat menggunakan pembelaan *Reynolds* secara lebih umum dengan membuktikan kewartawanan yang bertanggungjawab. Kenyataan Sedley LJ di *Charman* bahawa pemohon-pemohon mungkin perlu memutuskan antara pliding laporan atau kewartawanan yang bertanggungjawab — kerana selepas laporan itu dipercayai ianya secara forensik akan bermasalah untuk menggunakan pembelaan alternatif terhadap kewartawanan yang bertanggungjawab adalah obiter. Mahkamah di sana menangani pembelaan untuk laporan pertama dan setelah menolaknya, mengekalkan pembelaan *Reynolds* kerana mendapati penerbitan itu sebagai karya kewartawanan yang bertanggungjawab (lihat perenggan 160–162).

(13) **(oleh Harmindar Singh HMP, menentang)** Perayu-perayu dalam kes ini telah mempli perlindungan bersyarat dengan membuat rujukan spesifik kepada 'responsible journalism' dan 'public interest' dan kerana mereka mempunyai 'a duty to publish' kisah yang berlaku. Mana-mana plaintif, yang diberi nasihat sewajarnya, tidak akan meragui bahawa pembelaan untuk laporan juga dipli khususnya jika terma 'public interest privilege' atau 'responsible journalism' digunakan. Undang-undang untuk pliding tidak menghendaki terma undang-undang sebenar digunakan jika fakta dan keadaan mewajarkan pembelaan dibuat. Ia hanya perlu membuat pli fakta material dan bukan hasil undang-undang. Pliding adalah untuk memberi notis kepada pihak pembangkang tentang kes seseorang bagi menggalakkan litigasi yang adil dan berkesan. Jika terdapat apa-apa keraguan, pihak-pihak bebas untuk memohon selanjutnya dan memperbaiki butiran. Dalam keadaan sedemikian, ia tidak terbuka kepada responden untuk mendakwa terkejut atau prejudis berhubung isu pliding itu. Mahkamah perbicaraan adalah betul untuk memutuskan bahawa laporan tersebut telah dipli secukupnya (lihat perenggan 163–165).

Keputusan MR tidak boleh dikekalkan kerana sebab-sebab berikut:

(14) **(oleh Harmindar Singh HMP, menentang)** MR mendapati bahawa

perayu-perayu tidak boleh bergantung kepada pembelaan kewartawanan yang bertanggungjawab keranan mereka gagal memenuhi ujian sepuluh poin dalam *Reynolds*. Penghakiman mahkamah perbicaraan, bagaimanapun, menunjukkan bahawa hakim perbicaraan telah mempertimbangkan sepuluh poin itu sebagai isu kritikal tetapi telah mempertimbangkan, dengan betulm bahawa ia sekadar ilustrasi dan garis panduan am. Hakim perbicaraan juga dengan betul mendapati bahawa artikel pertama hanya tentang kebimbangan penduduk dan bukan sama ada syak wasangka mereka adalah benar. Dengan membaca artikel secara keseluruhan, dapat dilihat tiada penggunaan atau tokok tambah oleh perayu-perayu. Dapatan mahkamah perbicaraan tentang kewartawanan yang bertanggungjawab berkaitan artikel pertama adalah dengan itu dapat disangkal dan MR terkhilaf kerana mengganggu dengan dapatan tersebut (lihat perenggan 178–179, 181 & 183).

(15) **(oleh Harmindar Singh HMP, menentang)** MR telah terkhilaf kerana mengganggu dapatan mahkamah prebicaraan berkaitan artikel kedua dan ketiga dan dua video berkaitan enggan memutuskan bahawa kegagalan perayu-perayu untuk mengesahkan kebenaran dakwaan itu telah menafikan mereka perlindungan untuk perlindungan *Reynolds* dan juga pembelaan untuk laporan. MR mendapati bahawa perayu-perayu tidak memberi peluang kepada responden untuk menjawab dakwaan tersebut dan juga tidak meminta pengesahan tentang dakwaan tersebut daripada pakar bebas. Berhubung perkara pertama, mahkamah perbicaraan mendapati bahawa terdapat percubaan yang dibuat oleh perayu-perayu untuk menghubungi responden untuk satu maklumbalas tetapi responden enggan memberi ulasan. MR tidak menghebahkan mana-mana fakta yang didapati oleh mahkamah perbicaraan. Berhubung mendapatkan pengesahan daripada pakar, dalam kes laporan, selagi tiada penggunaan dan defendan terlibat dalam pelaporan yang berkecuali, tiada keperluan untuk mengesahkan kebenaran dakwaan berhubung pertikaian yang sedang berlaku. Oleh kerana perayu-perayu telah meminta komen Pengerusi BCAC pada ketika itu (yang mengesahkan kebimbangan penduduk), responden (yang mana tiada komen telah diperolehi daripadanya), seorang Menteri Persekutuan dan ahli Parlimen tempatan Ng Yen Yen (yang berkata bahawa lombong emas itu selamat) dan Jawatankuasa Kerajaan Negeri Tempatan, Persekitaran dan Pengerusi Jawatankuasa Kerajaan Negeri Tempatan, Alam Sekitar dan Kesihatan, Hoh Khai Mun (yang memberitahu Dewan Undangan Negeri bahawa air itu bebas sianida dan bahawa kehadiran bahan kimia beracun di udara berada dalam keadaan terhad), ia adalah adil dan munasabah untuk membuat kesimpulan bahawa artikel dan video yang dipersoalkan tersebut adalah pertikaian yang tepat, seimbang dan berkecuali (lihat perenggan 184–190).

(16) **(oleh Harmindar Singh HMP, menentang)** Jika apa-apa pengesahan

dikehendaki untuk membuktikan bahawa penerbit atau wartawan telah bertindak secara bertanggungjawab, ia tidak patut membebankan atau mengambil masa sehingga kesegeraan kisah itu hilang. Oleh kerana berita adalah komoditi yang mudah musnah, kesegeraan kisah adalah faktor yang perlu dipertimbangkan terutama berkenaan dengan kisah kepentingan awam yang sedang berlaku. Adalah tidak munasabah untuk mengharapkan surat khabar membuat pengesahan dengan pakar bebas atau melibatkan pakarnya sendiri sebelum menerbitkan perkembangan kisah yang menjadi tarikan harian. Isu-isu mengenai aktiviti responden dilaporkan secara meluas oleh media berita lain bahkan sebelum penerbitan perayu-perayu keluar; justeru untuk meletakkan beban ke atas perayu bagi membuat pengesahan dengan pakar bebas sebelum melaporkan perkara itu adalah membebankan dan tidak praktikal. Dalam memutuskan sama ada kriteria kewartawanan yang bertanggungjawab telah dipenuhi, mahkamah hendaklah mengguna pakai piawai tingkah laku yang diharapkan daripada seorang wartawan secara praktikal dan fleksibel. Keputusan MR untuk memutuskan terhadap perayu-perayu atas alasan bahawa mereka tidak mengesahkan kebenaran dakwaan itu dengan pakar bebas sebelum menerbitkan adalah tidak serupa dengan semangat sepuluh poin dalam *Reynolds* kerana sepuluh poin itu tidak boleh dianggap sebagai sepuluh rintangan yang perlu diatasi dan jika gagal maka pembelaan akan gagal (lihat perenggan 191–194).

(17) **(oleh Harmindar Singh HMP, menentang)** Pembacaan biasa artikel-artikel yan dipersolakan dan nada yang digunakan tidak mewajarkan pandangan MR bahawa artikel-artikel tersbut'not fair dan neutral', bahawa perayu-perayu telah 'garnished and embellished' dakwaan-dakwaan itu, bahawa ia telah dinyatakan dalam 'sarcastic' atau 'accusatory and damaging tone' atau bahawa perayu-perayu telah 'embraced and adopted' aduan-aduan tersebut sebagai yang benar. Kata-kata berunsur fitnah yang didakwa itu perlu dinilai secara objektif dan bukan melalui pandangan plaintif yang mengadu atau makna yang diberikan oleh plaintif terhadap kata-kata itu. Pembelaan untuk laporan hanya hilang dengan tokok tambah oleh wartawan yang menambahkan komennya untuk memberikan kebenaran kepada cerita itu. MR juga menyatakan bahawa artikel yang dipersoalkan itu menegaskan sesuatu yang jahat dan bersikap berat sebelah terhadap responden. Mahkamah perbicaraan, bagaimanapun, mendapati tiada niat jahat di pihak perayu-perayu dan tiada pengakasaan dalam dapatan ini semasa rayuan (lihat perenggan 195–198).]

Cases referred to

Adam v Ward [1917] AC 309, HL (refd)
Al-Fagih v HH Saudi Research & Marketing (UK) Ltd [2001] EWCA Civ 1634, CA (refd)
Bonnick v Morris and others [2003] 1 AC 300, PC (refd)
Charman v Orion Publishing Group Ltd and others [2008] 1 All ER 750; [2007] EWCA Civ 972, CA (folld)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 3 AMR 514, HC (refd)
Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor [2017] 6 MLJ 133, FC (refd)
Durie v Gardiner [2018] 3 NZLR 131, CA (refd)
Flood v Times Newspapers Ltd [2012] 2 WLR 760; [2012] UKSC 11; [2012] 2 AC 273; [2012] 4 All ER 913, SC (refd)
Galloway v Telegraph Group Ltd [2006] EWCA Civ 17, CA (refd)
Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449, FC (folld)
Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors [2012] 4 MLJ 191, CA (refd)
Horrocks v Lowe [1975] AC 135, HL (refd)
Jameel and another v Wall Street Journal Europe SPRL [2006] 4 All ER 1279; [2006] UKHL 44; [2007] 1 AC 359, HL (refd)
Lange v Atkinson [1998] 3 NZLR 424, CA (refd)
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, HC (refd)
Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd [1964] AC 234, HL (refd)
Lord McAlpine of West Green v Bercow [2013] EWHC 1342 (QB); [2013] All ER (D) 301 (May), QBD (refd)
Loutchansky v Times Newspapers Ltd and others (Nos 4 and 5); Loutchansky v Times Newspapers Ltd (Nos 2, 3 and 5) [2002] QB 783, CA (refd)
Malik v Newspost Ltd and others [2007] EWHC 3063 (QB), QBD (refd)
Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal [2017] 1 MLJ 262, CA (refd)
Prince Radu of Hohenzollern v Houston and another [2007] EWHC 2735 (QB), QBD (refd)
Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee [2019] 3 MLJ 720; [2019] 3 CLJ 729, FC (refd)
Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors [2018] 4 MLJ 209, CA (refd)
Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors [2016] 12 MLJ 476; [2016] 7 CLJ 124, HC (refd)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127; [1999] 4 All ER 609, CA (refd)

Roberts and another v Gable and others [2008] 2 WLR 129, CA (refd)
Serafin v Malkiewicz and others [2020] 4 All ER 711; [2020] UKSC 23, SC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187, FC (refd
Thoday v Thoday [1964] 1 All ER 341, CA (refd)
Vandervell's Trusts (No 2), Re [1974] Ch 269, Ch D (distd)

Legislation referred to

Defamation Act 2005 [AU] s 29A
Defamation Act 2013 [UK] s 4, 4(1), (1)(b), (3), (6)
Federal Constitution art 10, 10(1)(a)

Appeal from: Civil Appeal No W-02(NCVC)(W)-1073–06 of 2016 (Court of Appeal, Putrajaya)

Cyrus Das (James Khong, Syahredzan Johan and Edwin Lim with him) (James Khong) for the appellants.
Cecil Abraham (Sunil Abraham, Noor Muzalifah Shabudin and Anne Sangeetha Sebastian with him) (Cecil Abraham & Partners) for the respondent.

Abdul Rahman Sebli FCJ (delivering majority judgment of the court):

[1] The factual background of the case and the leave questions posed for our determination have been set out by my learned brother Harmindar Singh Dhaliwal FCJ in his judgment. For the purposes of this judgment, I shall leave out the factual background but shall set out the leave questions again, which are as follows:

(1) whether reportage is in law a separate defence from qualified privilege or the *Reynolds* defence of responsible journalism and whether it is to be treated as being mutually exclusive?

(2) whether the defence of reportage being an off-shoot of the *Reynolds* defence of responsible journalism needs to be pleaded separately from the plea of responsible journalism itself?

(3) whether a defendant is obliged to plead either reportage or responsible journalism and not plead them in the alternative?

(4) whether the defence of reportage which is in law based on an on-going matter of public concern is sufficiently pleaded if it is stated by the defendant that the publications 'were and still are matters of public interest which the defendants were under a duty to publish'?

A (5) whether the proper test to determine if the defence of reportage succeeds is the test of adoption by the journalist of the publication as true and not for the journalist to establish his neutrality by independent verification?

(6) in publishing video recordings of statements by third parties in a press B conference, whether the mere publication of such videos could be held to be embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media?

(7) whether in an on-going dispute, the impugned article or videos ought to be considered together with previous and continuing publications of the C news media on the same subject matter of public concern in determining the defence of reportage?

(8) whether it is proper to award general damages for loss of goodwill and vindication of reputation to a plaintiff company that has independently D been subjected to a voluntary winding up by its creditors? and

(9) whether loss of goodwill can be recovered as a component of defamatory damages by a plaintiff company that has gone into insolvency?

E **[2]** As can be seen, leave questions 1–7 are concerned only with issues pertaining to the defence of reportage vis a vis the *Reynolds* defence of responsible journalism or qualified privilege and questions 8–9 with recovery of damages by a company that has been voluntarily wound up. Questions 1–7 are inextricably connected and shall be dealt with together. I do not find it F necessary to consider them separately as that will involve overlaps and unnecessary repetitions.

[3] The *Reynolds* defence of responsible journalism or qualified privilege refers to the principle laid down by the House of Lords in *Reynolds v Times* G *Newspapers Ltd and others* [2001] 2 AC 127; [1999] 4 All ER 609. To succeed in establishing the common law defence, two requirements must be met:

(a) the publication must be on a matter of public interest; and

(b) the steps taken to gather, verify and publish the information must be H responsible and fair.

[4] My learned brother Harmindar Singh Dhaliwal FCJ in his judgment has ruled against the appellants on the issue of whether the impugned second article and first video were actionable in defamation. For the reasons given by I His Lordship at paras [117]–[123] of the judgment, I agree.

[5] As a starting point, the parties were on common ground that the statements in the three articles and the two videos published by the appellants were defamatory of the respondent. The articles and videos impute to the

respondent dishonourable or discreditable conduct or motives or lack of integrity and being an unethical and greedy mining company. The parties were also on common ground that the articles and videos were published on a matter of public interest.

[6] There was also no disagreement over the High Court's observation at para [17] of the judgment that the concerns of the Bukit Koman residents over their health and safety issues as depicted in the articles and videos turned out to be groundless and that the use of sodium cyanide by the respondent for its Carbon-in-Leach plant did not at all cause any pollution as the respondent had exercised stringent safety and appropriate methods in mining gold. In today's parlance, they were fake news. The evidence in fact shows that the various health issues faced by most of the residents of Bukit Koman were due to traces of herbicide. There was no appeal against this part of the judgment.

[7] The only issue left to be considered is whether the Court of Appeal was right in holding that the High Court was wrong in deciding that the defence of reportage need not be pleaded and that on the evidence both the defense of reportage and the *Reynolds* defence of responsible journalism had been established by the appellants. The judgment of the High Court has since been reported in *Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors* [2016] 12 MLJ 476.

[8] At the trial of the action the appellants relied heavily on the unpleaded defence of reportage in their closing submissions and they succeeded. The High Court accepted the appellants' contention that since the defence of reportage forms part of the *Reynolds* defence of responsible journalism or qualified privilege, which the appellants had already pleaded in their statement of defense, the defence need not be pleaded. The High Court had thus subscribed to the notion that the *Reynolds* defence of responsible journalism covers and includes the defence of reportage.

[9] The learned High Court judge proffered the following reasons for coming to the conclusion that the appellants had succeeded in establishing the defence of reportage and the *Reynolds* defence of responsible journalism:

> [25] I am of the opinion that the first article merely reported the concern of the Bukit Koman's residents as to their health and the suspicion that the air pollution may be caused by the plaintiff's gold mining operation. Regarding the first article as a whole, one will find that it made no allegations or criticism against the plaintiff. In other words, there is no embellishment of the contents of the first article by the first and second defendants. Much has been argued by learned counsel for the plaintiff that the first and second defendants have not verified the contents of the first article with the plaintiff or with other experts before publishing the same. However, in my opinion the act of the second defendant contacting the Chairman of the Bukit

Koman Anti-Cyanide Committee prior to the publication of the first article was sufficient in the circumstances of this case to constitute responsible journalism. This is because the first article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman residents regarding the air pollution which they suspect was caused by the plaintiff's plant. The defendants therefore have satisfied the test of responsible journalism.

[26] As for the second article with link to the first video and the third article with link to the second video, it cannot be denied that these were reproduction of the two press conferences held on 21 June 2012 and 2 August 2012. There is no evidence that the first defendant as publisher of those articles and videos, the third defendant as author of the second article, the fourth defendant as author of the third article and DW3 as the videographer for the first and second videos adopted the contents of those articles and videos as their own. As I have alluded to, the said articles and videos are matter of public concern where the public in general has the right to know the information and the defendants as media and journalists were under, at least a moral duty to publish the same.

[27] Further, it is my judgment that the defence of reportage is clearly available to the defendants with regard to the publication of the second and the third articles and the first and second videos. It is not so much the truth of the contents of the said articles and videos that matters, but rather the fact that they were reproduction of the two press conferences held by BCAC, first on 21 June 2012 and, second on 2 August 2012. Malaysiakini and other medias had received invitation to attend the two press conferences. The defence of reportage is therefore available to the defendants because the public interest here lies not in the truth of the contents of the said articles and videos, but on the facts that they had been made. The two press conferences held by BCAC themselves, in my view, are matter of public interest. I am aware of the general principle that a person who repeats the defamatory words of another will also be liable to the person defamed. However, it has been said that the *Reynolds* privilege of reportage appears to be the exception to the so-called general rule of repetition.

[28] The plaintiff's learned counsel submitted that the defendants have not specifically pleaded reportage in their defence and as such should not be allowed to rely on this particular defence. I merely wish to say that reportage is one form of the *Reynolds* privilege and it is considered part of the qualified privilege defence. The defendants have pleaded qualified privilege as one of their defences to the plaintiff's claim in paras 33 and 35 of the defence. In my opinion that would be sufficient to enable the defendant to prove reportage at the trial of the action. I am also in agreement with learned counsel for the defendants that the case of *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191; [2011] 3 CLJ 861 relied upon by the plaintiff's learned counsel was decided based on the particular facts of that case.

[10] The Court of Appeal disagreed and unanimously decided that the High Court was wrong both in law and on the facts in finding that the appellants had established the defence of reportage and the *Reynolds* defence of responsible journalism.

[11] On the defence of reportage, the Court of Appeal's view was that the defence must be specifically pleaded as it is distinct and separate from the *Reynolds* defence of responsible journalism: see *Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors* [2018] 4 MLJ 209. In drawing the distinction between the *Reynolds* defence of responsible journalism and the defence of reportage, the Court of Appeal referred to the following authorities, followed by the panel's observations:

(a) *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279; [2006] UKHL 44; [2007] 1 AC 359 ('Jameel'):

> ... reportage was recognized as another form of *Reynolds* privilege defence. Lord Hoffman observed that *the Reynolds privilege will not get off the ground unless the journalist honestly and reasonably believed the statement was true*. But there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, *where it may be clear that the publisher does not subscribe to any belief in its truth*. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at trial. (Emphasis added.)

(b) *Roberts and another v Gable and others* [2008] 2 WLR 129 ('Gable'):

> We have made our observations on *Roberts and another*nthat reportage is 'a form of, or a special example of *Reynolds* privilege, a special kind of responsible journalism but with *distinctive features of its own*'. Given the illustration by Ward LJ at paragraph 61(5), it appears that the defence of reportage and responsible journalism may be pleaded in the alternative, in that if the defence of reportage fails, then the defendant can still fall back on the defence of responsible journalism. (Emphasis added.)

(c) *Flood v Times Newspapers Ltd* [2012] 2 WLR 760; [2012] UKSC 11; [2012] 2 AC 273; [2012] 4 All ER 913 ('Flood'):

> ... Lord Phillips explained reportage as a 'special and relatively rare form of *Reynolds* privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. It protects the publisher if he has taken proper steps to verify the making of the allegation *provided that he does not adopt it*. (Emphasis added.)

(d) *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750; [2007] EWCA Civ 972 ('Charman'):

> In *Michael Charman*, Sedley LJ at [91] appeared to take the view that the defences of reportage and responsible journalism were incompatible in that *once a defendant has relied on the defence of reportage it makes it forensically problematical to fall back upon an alternative defence of responsible journalism and due to this difficulty, pleaders may decide which it is to be; reportage or responsible journalism*. (Emphasis added.)

[12] In *Gable*, the *Reynolds* defence of responsible journalism and the

defence of reportage were treated as distinct defences, each involving separate and distinct analysis. This was how Ward LJ dealt with the matter:

> [61] Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of reportage.
>
> (1) The information must be in the public interest.
>
> (2) Since the public cannot have an interest in receiving misinformation which is destructive of the democratic society (see Lord Hobhouse in *Reynolds* at p 238), the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published (see also *Reynolds*, Lord Nicholls' factor four at page 205 B, and Lord Cooke at p 225, and in *Jameel*, Lord Bingham at paragraph 12 and Baroness Hale at paragraph 149). *This is where reportage parts company with Reynolds*. In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.
>
> (3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ and the speech of Lord Hoffman cited in paragraphs 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 969. *If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true,* then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said *without adopting the truth*.
>
> (4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of information, the manner of its reporting and the purpose to be served will be material.
>
> (5) *This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way*. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report.
>
> (6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from the *Reynolds case* [2001] 2 AC 127, the burden being on the defendants. In this way the balance between article 10 and article 8 can be maintained. All the circumstances of the case and the ten factors listed

> by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered in order to reach the necessary conclusion that this was the product of responsible journalism. (Emphasis added.)

[13] What is clear from the judgment is that reportage will not protect the journalist who is guilty of either of the following acts:

(a) if he adopts the report and makes it his own; or

(b) if he fails to report the story in a fair, disinterested and neutral way.

[14] What this means is that a journalist who wishes to be protected by reportage parts company with the *Reynolds* defence of responsible journalism, which allows him to put forward the defamatory material as true and accurate, but which the defence of reportage does not allow. For this reason, he cannot have it both ways. As Sedley J said in *Charman* 'once a defendant has relied on the defence of reportage it makes it forensically problematical to fall back upon an alternative defence of responsible journalism and due to this difficulty, pleaders may decide which it is to be; reportage or responsible journalism'. In other words, the choice is either to plead reportage or responsible journalism. It would be a contradiction in terms for the pleader to plead, on the one hand, that he believes in the truth and accuracy of the defamatory statement and on the other to plead that he does not.

[15] Whether it is the defence of reportage or the defence of qualified privilege, the publication must always meet the standards of responsible journalism. Like the *Reynolds* defence of responsible journalism, reportage is a defence of public interest. Lord Mance said in *Flood*:

> I agree in this connection with what I understand to be Lord Phillips PSC's view that the defence of public interest involves a spectrum. At one end is pure reportage, where the mere fact of a statement is itself of, and is reported as being of, public interest. Higher up is a case like the present, where a greater or lesser degree of suspicion is reported and the press cannot disclaim all responsibility for checking their sources as far as practicable, but, provided the report is of real and unmistakeably public interest *and is fairly presented*, need not be in a position to produce primary evidence of the information given by such sources. (Emphasis added.)

[16] Where the journalist loses the protection of reportage by adopting the report and making it his own or is not being fair, disinterested and neutral in his reporting, the repetition rule will then apply, ie 'repeating someone else's libelous statement is just as bad as making the statement directly' (*Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1964] AC 234 at p 260 per Lord Reid) and he must then prove the truth and accuracy of the defamatory statement that he publishes. He will not be protected by reportage

as a defence but he may seek the protection of the *Reynolds* defence of responsible journalism, which is to take appropriate and reasonable steps to verify the truth and accuracy of the allegation.

[17] The learned authors of *Gatley on Libel and Slander* (12th Ed) have this to say on the defence of reportage:

> If the defence is of the 'reportage' variety, where it is not the content of a reported allegation that is of interest but the fact that the allegation has been made, *the verifications requirement is to take proper steps to verify the making of the allegation, which must not be adopted*. (Emphasis added.)

[18] In *Durie v Gardiner* [2018] 3 NZLR 131, a fairly recent decision of the New Zealand Court of Appeal, the majority (2:1) held the view that reportage should not be regarded as a separate defence but should be pleaded as 'a particular' of the public interest defence as the concept of neutral reportage rested on both elements of the new defence. However, Brown J in his dissenting judgment disagreed with the majority and gave a nod of approval to Sedley J's view in *Charman* when he said:

> [113] If reportage is to be recognized in New Zealand as a common law defence, then I consider that *it should be viewed as a discrete defence rather than merely as a special manifestation of a public interest defence which has a responsible journalism underpinning*. I am attracted by the analysis of Sedley LJ in *Charman v Orion Publishing Group Ltd* that the very dependence of a reportage defence on the bald retelling of a defamatory statement makes it forensically problematical to fall back upon an alternative defence of responsible journalism. *I agree with his view that pleaders may need to decide which it is to be.* I do not consider that the majority's proposal that reportage should be pleaded as a particular of the public interest defence surmounts this difficulty. Hence, I do not share the majority's perception of the new defence of public interest communication as one embodying the nature of a spectrum which includes reportage, albeit at the furthest point on that spectrum. (Emphasis added.)

[19] The view, which accords with *Charman,* is that the defendant must choose between the defence of reportage and the *Reynolds* defence of responsible journalism and it is not enough to merely plead the defence of reportage as 'a particular' of the *Reynolds* defence of responsible journalism.

[20] Having regard to the authorities, I am inclined to agree with the respondent that as a matter of doctrine the defence of reportage cannot be reconciled as part of the *Reynolds* defence of responsible journalism or qualified privilege. The reasons are compelling. First of all, the gulf between the two defences is too wide to be abridged as defences of the same specie. In the case of the *Reynolds* defence of responsible journalism, the focus is on ensuring that the journalist takes the reasonable steps of verifying the truth and accuracy of any

allegation that he reports, as explained by Lord Bingham in *Jameel*:

> [32] ... the rationale of [the responsible journalism] test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify ... The publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

[21] By contrast, the defence of reportage is concerned not with the truth and accuracy of the defamatory allegations but with the narrower public interest of knowing that the allegations were in fact made: *Jameel*.

[22] The respondent is therefore right in my opinion to contend that given the different focus pursued by the two defences, it is entirely contradictory that a defence that is unconcerned with the truth and accuracy of the allegations can be regarded as part of the *Reynolds* defence of responsible journalism which is concerned with the exact opposite of the proposition, ie with the truth and accuracy of the imputation that is reported. They are, in that sense, at opposite ends of the pole. The only meeting point between the two defences is that they are both public interest defences.

[23] Given the material and irreconcilable differences in the basic features between the two defences, it would be wrong in principle for the court to regard the defence of reportage as part of the *Reynolds* defence of responsible journalism.

[24] It is therefore of crucial importance to appreciate that reportage as a form of journalism is a substantial departure from the *Reynolds* defence of responsible journalism or qualified privilege, which is the process of verification by reporters of the truth and accuracy of the defamatory statements whereas reportage is to report the defamatory statements in a fair, disinterested and neutral manner. Lord Hobhouse's dicta in *Reynolds* lends credence to the rationale, where His Lordship said at p 263:

> No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such society. *There is no duty to publish what is not true: there is no interest in being misinformed.* (Emphasis added.)

[25] It is another way of saying that no public interest is served by communicating and receiving false information, be it by way of reportage or by way of responsible journalism. Further, the journalist relying on the *Reynolds* defence of responsible journalism is permitted to express his opinion on the

matter that he is reporting. That is not the case with reportage, which requires the journalist to be detached and to report in a fair, disinterested and neutral way. The consequence of failing to comply with this requirement of neutrality was explained by Ward LJ in *Gable* in the following terms:

> (5) This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must show, if he can, that it was a piece of responsible journalism even though he did not check the accuracy of his report.

[26] No such consequence entails a breach of the *Reynolds* defence of responsible journalism as the journalist is protected not by reporting in a fair, disinterested and neutral way but by taking reasonable steps to verify the truth and accuracy of the defamatory statements.

[27] Thus, having regard to the material differences in the defining characteristics of reportage and the *Reynolds* defence of responsible journalism and the different consequences that flow from their breaches, the two defences must be treated as mutually exclusive. The Court of Appeal was therefore correct in holding that the defence of reportage must be specifically pleaded as it is distinct and separate from the *Reynolds* defence of responsible journalism.

[28] The learned trial judge was wrong on the other hand to accept the unpleaded defence of reportage, which was only raised by the appellants in their closing submissions. The learned judge should only have proceeded to consider the pleaded *Reynolds* defence of responsible journalism or qualified privilege.

[29] The law is trite that parties are bound by their pleaded causes of action: see the decision of this court in *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449 where it was held as follows:

> [42] Now it is trite law that the plaintiff is bound by its own pleadings (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Anjalal Anmal & Anor v Abdul Kareem* [1969] 1 MLJ 22; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC); *Joo Chin Kia v Loh Seng Tek* [1987] 1 CLJ 194; *KEP Mohamed Ali v KEP Mohamad Ismail* [1981] 2 MLJ 10 (FC). The plaintiff is not permitted to improve its pleading in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was *not within the contemplation of the parties in the first place* (see *Esso Petroleum Co Ltd v SouthPort Corpn* [1956] AC 218; *Playing Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182 (FC). (Emphasis added.)

[30] The *ratio* applies with equal force to pleaded defences. In the present

case, the defence that the appellants pleaded was three-fold, namely: (1) fair comment; (2) the *Reynolds* defence of responsible journalism or qualified privilege; and (3) freedom of expression as enshrined in art 10(1)(a) of the Federal Constitution.

[31] The defence of reportage is conspicuous in its absence. Not a word of the defence was mentioned in the statement of defence. Nor can the defence be implied from the pleadings. Yet it was relied heavily on by the appellants in their closing submissions at the trial. What the appellants did was to ride on their pleaded *Reynolds* defence of responsible journalism to pursue their unpleaded defence of reportage.

[32] Having found that the appellants had succeeded in establishing both the defence of reportage and the *Reynolds* defence of responsible journalism, the learned trial judge found it unnecessary to deal with the defence of fair comment. Presumably for the same reason, nor did she deal with the defence of freedom of expression, the third and last line of the appellants' defence, which was also pleaded in the alternative.

[33] In the absence of any amendment to the statement of defence, the appellants should not have been allowed to travel outside the four corners of their pleaded defences, namely fair comment, the *Reynolds* defence of responsible journalism and freedom of expression.

[34] It is necessary to reproduce the following paragraphs of the appellants' statement of defence to see if reportage fits in with the *Reynolds* defence of responsible journalism:

> A. The 1st Article
>
> 11. Further and/or in the alternative, the 1st and 2nd Defendants contend that the 1st Article constitutes fair comment on a matter of public interest by reference to the facts set out below. The 1st and 2nd Defendants honestly believed that the facts set out below were the basis for the comment.
>
> Particulars of Facts on which the Comment is based
>
> 11.1 The 1st and 2nd Defendants repeat paragraphs 2.1 to 2.6 above.
>
> 11.2 The matters described in the 1st Article had been experienced or observed by residents in the Affected Community;
>
> 11.3 Residents within the Affected Community had been experiencing increased skin and eye irritation and respiratory complications in the period since the commencement of the Plaintiff's mining operations;
>
> 11.4 Residents within the Affected Community had expressed a suspicion that the said matters were connected with the Plaintiff's mining operations.

B. The 2nd Article

16. Further and/or in the alternative, the 1st and 3rd Defendants contend that the 2nd Article constitutes fair comment on a matter of public interest by reference to the facts set out below. The 1st and 3rd Defendants honestly believed that the facts as set out below were the basis for the comment.

Particulars of Facts on which Comment is based

16.1 The 1st and 3rd Defendants repeat paragraphs 2.1 to 2.6 and paragraphs 11.1 to 11.5 above.

16.2 A survey had been conducted by the Committee amongst residents of Bukit Koman, the results of which were described in the 2nd Article;

16.3 Tan Hui Chun, an environmental and occupational safety consultant, had described the results as alarming;

16.4 Khim Pa, a dermatologist had expressed the view that the results indicated a level of 'irritating material' in the air sufficient to cause skin and eye irritation as well as respiratory difficulties; and

16.5 The Committee had stated that it would submit the survey results to the relevant authorities in the belief that the results justified their concerns concerning the impact of the Plaintiff's mining operations on the Affected Community.

C. The 1st Video

22. Further and/or in the alternative, the 1st Defendant contend that the words spoken and published in the 1st Video constitute fair comment on a matter of public interest by reference to the facts set out below.

The 1st Defendant honestly believed that the facts set out below were basis for the comment.

Particulars of Facts on which Comment is based

22.1 The 1st Defendant repeat paragraphs 2.1 to 2.6, 11.1 to 11.5 and 16.1 to 16.5 above.

22.2 The press conference did take place and the results of the survey conducted by the Committee referred to in paragraph 16.2 above were made known to attendees. These were described in the 2nd Article and in the 1st Video.

D. The 3rd Article

26. Further and/or in the alternative, the 1st and 4th Defendants contend that the 2nd Article constitutes fair comment on a matter of public interest by reference to the facts set out below. The 1st and 4th Defendants honestly believed that the facts set out below were the basis for the comment.

Particulars of Facts on which Comment is based

26.1 The 1st and 4th defendants repeat paragraphs 2.1 to 2.6, 11.1 to 11.5, 16.1 to 16.5 and 22.1 to 22.2 above.

26.2 The Plaintiff had not taken any reasonable steps to address the concerns of the

Committee and the resident of the Affected Community.

26.3 The Plaintiff had failed to make known, either for the purposes of the Judicial Review Proceedings or otherwise, any material of sufficient objectivity and reliability to rebut the two expert reports referred to in paragraph 2.3 above.

E. *The second video*

31. Further and/or in the alternative the 1*st* Defendant contend that the 2nd Video constitutes fair comment on a matter of public interest by reference to the facts set out below. The 1st Defendant honestly believed that the facts set out below were the basis for the comment.

Particulars of Facts on which Comment is based

31.1 The 1st Defendant repeat paragraphs 2.1 to 2.5, 8.2 to 8.5, 13.2 to 13.6, 19, 19.2, 23.2 and 23.3 and 26.1 to 26.3 above.

F. Qualified Privilege

33. Further and/or in the alternative, the Defendants contend that the impugned words and depictions in each of the Articles and Videos were published on occasions of qualified privilege. The Defendants contend that they honestly and reasonably believed the statements reported and published in the impugned Articles and Videos to be true.

Particulars

33.1 The Defendants repeat paragraphs 2.1 to 33 above including sub- paragraphs thereto.

33.2 The Articles and the Videos published by the Defendants concern aspects of a matter of public interest as explained above.

33.3 The Defendants were under a duty to publish the Articles and Videos to its readership and subscribers which had a corresponding interest in receiving the same.

34. Further to the above, for the 3rd Article and the 2nd Video, at no time did the Plaintiff seek to make any press statements through the Defendants. The Defendants contend that the Plaintiffs would have been afforded an opportunity to have their version of events published. The 1st and 4th Defendants had further sought the comment of one of the Plaintiff's directors, Andrew Kam, to no avail.

35. Further and/or in the alternative, the Defendants contend that the publication of the Articles and Videos was in furtherance of responsible journalism on the part of the Defendants. In this regard, the subject of the Articles and the Videos were and still are matters of public interest which the Defendants were under a duty to publish.

36. Further and/or in the alternative, the Defendants contend that the publication of the Article and Videos were protected by the guarantee of freedom of free expression enshrined under Article 10(1)(a) of the Federal Constitution.

[35] The *Reynolds* defence of responsible journalism or qualified privilege

was pleaded in the alternative in paras 33 and 35 of the statement of defence. Although pleaded in the alternative, the defence formed the bedrock of the appellants' defence in answer to the defamation action. It was not, it will be noted, pleaded in the alternative to the defence of reportage, which was not part of the pleaded defence, not that the defences can be pleaded in the alternative.

[36] The appellants cited the case of *Re Vandervell's Trusts (No 2)* [1974] Ch 269 to substantiate their argument that their failure to plead reportage is permissible in law. The following dicta by Lord Denning was quoted:

> Mr Balcombe for the executors stressed that the points taken by Mr. Mills were not covered by the pleadings. He said time and again: 'This way of putting the case was not pleaded'. 'No such trust was pleaded'. And so forth. The more he argued, the more technical he became. I began to think we were back in the old days before the Common Law Procedure Acts 1852 and 1854, when pleadings had to state the legal result; and a case could be lost by the omission of a single averment: see Bullen and Leake's Precedents and Pleadings, 3rd ed (1868), p 147. All that has been swept away. It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. The pleadings in this case contained all the material facts. It does appear that Mr Mills put the case before us differently from the way in which it was put before the judge: but this did not entail any difference in the facts, only a difference in stating the legal consequences. So, it was quite open to him.

[37] But this is to be distinguished from the present case which is premised on an action in defamation where it was imperative for the appellants to sufficiently plead their defence(s). Further, the appellants only quoted the judgment of Lord Denning and omitted to highlight the dicta of Lawton LJ at p 324 which reads:

> As to the pleading point, it is pertinent to bear in mind what, under the Rules of the Supreme Court, should be put in pleadings. Ord 18, r 7, provides as follows:
>
> > 'Subject to the provisions of this rule, and rules 7A, 10, 11 and 12' (none of which are relevant in this case), every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, ... and the statement must be as brief as the nature of the case admits.
>
> It follows, so it seems to me, that the question for decision in the case is whether the material facts have been set out in the pleadings, not whether Mr. Mills made submissions before this court as to legal consequences which had not been set out. Much the same kind of point was taken before this court in *Lever Brothers Ltd v Bell* [1931] 1 KB 557. When dealing with it Scrutton LJ said, at pp 582–583:
>
> > In my opinion the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated

> in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigation at the trial.
>
> These comments are apt to fit this case, which is not one within the exception. In my judgment *the pleadings did set out all the material facts sufficient to justify the legal results which Lord Denning MR has adjudged follow and with which I agree.* (Emphasis added.)

[38] It is thus clear that in that case the material facts were set out in the pleadings. In the context of the present case, what the appellants needed to do was to set out all the material facts relating to the defence of reportage, which they did not. Obviously the appellants' reliance on *Re Vandervell's Trust* was to support their argument that only material facts need to be pleaded. The argument must fall because in this case the material facts relating to the defence of reportage were not pleaded at all.

[39] As the defence of reportage is separate and distinct from the *Reynolds* defence of responsible journalism and that the two defences are mutually exclusive, it bears repetition that it should have been rejected by the High Court as it was only raised by the appellants in their closing submissions. Only the pleaded *Reynolds* defence of responsible journalism should have been considered by the High Court.

[40] This is not to say that the appellants could not avail themselves of the defence of reportage. They could, but they must plead it: see also *Lord McAlpine of West Green v Bercow* [2013] EWHC 1342 (QB); [2013] All ER (D) 301 (May) where Tugendhat J said:

> [89] If the Defendant wished to avail herself of a public interest defence, such as *Reynolds* privilege or *reportage*, she would have had to plead it. She has not done so.

[41] No authority was cited by the appellants to support their contention that the defence of reportage is covered by the *Reynolds* defence of responsible journalism and therefore need not be pleaded. What is clear from the authorities cited by the appellants is that reportage is a special kind of responsible journalism but with 'distinctive features' of its own: see for example *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634. In *Gable,* Ward LJ said that: 'If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed'.

[42] As for the reason why, in a true case of reportage, there is no need for the journalist to take steps to ensure the accuracy of the published information, which is a requirement of the *Reynolds* defence of responsible journalism, the

following observations by Ward LJ in *Gable* are relevant and bear reproducing:

> (3) The question which perplexed me is why that important factor can be disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ in the *Al-Fagih case* [2002] EMLR 215, paras 65, 67–68 and the speech of Lord Hoffman in the *Jameel case* [2007] 1 AC 359, para 62 cited in paras 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 969. If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.
>
> (4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.
>
> (5) This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of the report.

[43] A close look at the appellants' statement of defence will reveal that other than the element of public interest, none of the other characteristics of reportage were pleaded, in particular the element of neutrality and the element of not subscribing to a belief in the truth of the imputations. These are material facts which the appellants ought to have set out in the pleadings if they wanted to rely on reportage as a defence.

[44] In fact, the statement of defence read in its entirety runs counter to the core principle behind the defence of reportage by adopting the defamatory statements in the articles and videos as their own instead of simply reporting them in a neutral fashion. This is not surprising given the fact that the appellants were relying on the defence of fair comment, responsible journalism and freedom of expression and not on reportage, except by way of argument in the closing submissions.

[45] There is another reason why the defence of reportage must be pleaded. It is not the duty of the court to entertain such unpleaded defence. It is prejudicial and unfair to the party against whom the defence is raised. According to learned counsel for the respondent, the questions that they put

forth during the trial were tailored to address the issues and defences which were pleaded by the appellants in their defence, of which reportage was not one of them. They were therefore taken by surprise by a defence that was only brought up in the closing submissions.

[46] There is merit in the respondent's contention that had the appellants properly pleaded the defence of reportage, the tone and style of the cross examination would have been different in that questions specific to the defence of reportage would have been asked. For example, learned counsel for the respondent would have asked all relevant questions on whether the articles were reported in a fair, disinterested and neutral way. Questions would also have been put to the appellants' witnesses as to whether the articles were mere reproductions or were put forth to establish the truth of any of the defamatory statements.

[47] In relation to the element of neutrality in the defence of reportage, guidance may be found in *Jameel* where Lord Phillips held that it is essential for a defendant to make it clear in his pleading when he is relying on the *Reynolds* privilege, ie *subjective belief in the truth of the statements*, and when he is relying on reportage ie *no belief in the truth of the statements*. The appellants did not make this clear in their pleadings. This is what Lord Phillips said:

> [29] These statements suggest that it may be necessary or at least admissible for a defendant to allege and prove subjective belief in order to establish a defence of Reynolds privilege ...
>
> [31] ... It is important that the pleadings should make clear where a defendant is relying on reasonable belief in the truth of matters published, or their implications, and where he is not. *It is also important that the claimant should make clear whether or not he denies that the belief was held, or whether he merely contends that the belief was not reasonable.* (Emphasis added.)

[48] From the pleadings and the contents of the three articles and two videos, it is obvious that the appellants had, in breach of the reportage rule, subscribed to a belief in the truth and accuracy of the defamatory imputations. There is no averment in the statement of defence denying that they had subscribed to such belief and that they were simply reporting in a neutral fashion. A vital element of reportage was therefore missing from the pleadings to entitle the appellants to rely on the protection of reportage.

[49] It will take up much space to reproduce the three articles and transcripts of the videos in this judgment but it is necessary in order to appreciate the thrust and tone of the articles and videos. They are therefore reproduced in full below, minus the accompanying photos and graphics. It needs to be mentioned that the headlines and the words in bold were emphasis added by the appellants themselves:

First Article

Villagers fear for their health over cyanide pollution

Lee Weng Kiat 5:04 PM Mar 19, 2012

Besides suffering from the unbearable stench overnight, villagers have also found yellow powdery spots around their neighbourhood in Bukit Koman, Raub, where gold-mining activities using cyanide, a hazardous chemical, started three years ago.

The unusual yellow dots have further escalated the fears of Bukit Koman villagers, who have been suffering skin, eyes and respiratory *illnesses* for the past few years.

According to the latest blog posting by Bukit Koman anti-cyanide committee member Liew Kou Yoong, 76, the yellow powdery dots were also found on his car, at the house gate and on the ground around his house.

Another villager, Ching Pei Har, found the yellow spots, measuring up to 8mm in diameter, on his car last Saturday afternoon.

According to the blog, since the commencement of the gold-mining activities, birds such as pigeons and crows, and lizards, and vegetables cultivated in the neighbourhood have been found dead.

Villagers suspect the unexplained deaths, the stench of herbicide during the night, and the illnesses, are the results of cyanide pollution.

Committee chairperson Wong Kin Hoong (right) told *Malaysiakini* that the yellow spots may be residue from emissions from the mining operations.

Depending on the wind direction, the yellow dots are usually spotted on the ground, house roofs, cars and house gates after it had rained, he said.

Although the phenomenon had happened in the past, Wong explained that it only caught the attention of the villagers recently.

They had since notified their local representatives and the health department.

Air-pollution detected by devices

'If we can confirm the powdery dots are from the gasses emitted from the mine, it may be helpful in our court case', Wong said, adding that the villagers had sent the yellow powdery substance to the laboratory to determine its components and origin.

On March 21, 2008, four representatives of the residents including Wong, had filed a suit against the *gold-mining* activity, which is now before the courts.

This was to review the decision of the Department of Environment to approve a preliminary environmental impact assessment report for Raub Australian Gold Mining Sdn Bhd to operate a gold mine using cyanide.

Wong also claimed that the air around the village has been polluted as shown by the monitoring devices installed by the villagers.

The villagers had installed six air pollution monitoring devices in various areas of the village to measure the quantity of sulfur dioxide and cyanide in the air.

According to global standard, Wong explained, the air of a certain area is considered polluted if the reading exceeds the permissible level of four times in a year.

Although there was excessive reading once every month, which is way beyond the global standard, the results were not accepted by the court on the ground that they were not conducted professionally, he claimed.

Villagers had attempted to engage the services of some licenced companies to conduct the monitoring but none of them are willing to accept the job.

Wong suspects the companies dare not take up the job because of their business ties with government.'

Second Article

'78pct Bukit Koman folk have 'cyanide-related' ailments

Wong Teck Chi

12:54PM Jun 21, 2012

A recent survey done by Bukit Koman villagers revealed that 78.1 percent of the residents in surrounding areas were suffering health problems, which is believed to be related to cyanide used in local gold mine.

Topping the list was skin itchiness and rashes (50.1 percent), followed by eyesores/itchiness/dimness (43.9 percent), dizziness/headache (35 percent), fatigue (34.5 percent) and cough (33.4 percent).

The survey was carried out by the Bukit Koman action committee against the use of cyanide in gold mining on May 19 and 20.

The group interviewed 383 residents house by house in Bukit Koman and surrounding areas within a 1km radius.

It also revealed that the figures were higher among the residents who stay in Bukit Koman New Village, where 84.8 percent of the villagers said they have suffered at least one health problem, while 57.2 percent said their health conditions worsened after 2009, when the gold mine started operations.

Residents of Bukit Koman New Village had for a long time alleged that cyanide, which is used in the nearby mine, had led to a range of skin, eye, and respiratory *ailments*.

This is the first time they have carried out a survey scientifically to substantiate their claim.

Analysing the survey results, environmental and occupational safety consultant Tan Hui Chun said the figure of skin disease and coughing is 'alarming' because it is 10 times higher than the normal rate, which is usually 5 percent.

Dermatologist Khim Pa, who has 26 years experience in practice, also added that the results clearly showed that there is 'irritating' material on the air which caused the health problems.

'It is quite clear that more than 50 percent of people facing itchiness means that

there is something in the air irritating the eye and the skin… It is worse on the expose parts of the skin.

'If the same parties go into the lungs, they will cause coughing,' said the doctor during a press conference held yesterday at the Kuala Lumpur and Selangor Chinese Assembly Hall.

Bukit Koman action committee member Hue Shieh Lee said the committee will submit the survey results to relevant government authorities and hopes that the Minerals and Geoscience Department will revoke the licence of the gold mine to protect the residents' health.

Panel hopes Yen Yen will contest in Raub

In a related development, Hue also commented on speculation that local parliamentarian Ng Yen Yen may transfer to a 'safe seat' in the coming general election in view of the controversial issue.

She said the tourism minister, who was accused of being ignorant about the Bukit Koman issue, should stay in the Raub parliamentary seat and the villagers will give her 'a taste of losing'.

'Ng (*right*) is our representative in parliament, she should have listened to our voice and talked about the Bukit Koman issue. But unfortunately, she has always said this is a political issue, not a health issue.

'We are hoping that she will come back to taste what is a loss. If the election is clean, I believe we can say good bye to her'.

Also present during the press conference were fellow committee member Chong Choy Yen and Bukit Koman villagers Hue Ah New, Wong Soon Fatt and his seven-year-old son Woon Chee Hua.

Ng had previously said that the mine is safe, and the Local Government, Environment and Health Committee chairperson Hoh Khai Mun had recently told the state assembly that the water was *cyanide-free*, while the toxic chemical's presence in the air is within limits.'

Third Article

Raub folk to rally against poisonous gold mine

Victor TM Tan 5:56PM Aug 2, 2012

Residents of Bukit Koman, Raub are scheduled to hold a mass protest rally against the use of cyanide for gold mining activities by the Raub Australian Gold Mine (RAGM) Sdn Bhd in their neighbourhood.

The organisers, Ban Cyanide Action Committee, hope to gather some 20,000 people to pressure the federal government into halting RAGM's operations.

The rally, to be dubbed Himpunan Hijau Raub (Raub Green Rally) is scheduled for September 2 at the Dataran Raub.

'It has been more than 2000 days since RAGM started making money by extracting 'dirty gold', using life threatening cyanide compounds.

'No doubt that the mine bosses are laughing to their banks for they care not about the Raub residents', said committee chairperson Wong Kin Hoong told a press conference in Kuala Lumpur today.

Wong said that the refinery has been spewing pollutants 24 hours everyday but those who speak up are harassed.

'We are not against profit-making businesses. It just happened that this gold mine operators in a very unethical way that pollutes the environment and bring harm to our lives,' said Wong.

When contacted, RAGM director Andrew Kam declined comment.

On June 21, the committee had alleged that survey done on May 19 and 20 revealed that 78.1 percent of the residents in surrounding areas were suffering health problems, believed to be related to cyanide used in local gold mine.

However, a probe commissioned by Health Minister Liow Tiong Lai early last month has yet to reveal the findings.

Pakatan to join rally.

Meanwhile, Pakatan Rakyat will be offering its support for the rally.

PAS environmental bureau chief Zulkefli Mohamad Omar, who was also present at the press conference, said his party will be mobilizing its members to attend the rally.

'This will be like what we did in February in Kuantan. We must stop irresponsible individuals who continue to pollute the planet,' he said.

He would also recommend that Pahang PAS commissioner Tuan Ibrahim Tuan Man hold a Hari Raya event in Raub during the rally to attract more people.

'Since the rally will be held around the Aidilfitri period, let us celebrate it in a meaningful way,' he said.

Another speaker at the press conference, Selangor state executive councilor Ronnie Liu, accused the Pahang and federal government of ignoring the suffering of the villagers.

'We shouldn't give up easily until that boiling point comes, as these struggles for change require a long time to succeed,' said Liu, who hails from Raub.

[50] Note the 'poisonous' gold mine headlined in bold in the third article. The contents of the defamatory articles were sourced primarily from the two videos. This is undisputed. The first video shows a press conference held by Hue Shieh Lee, a committee member of the Ban Cyanide Action Committee ('the BCAC'). In the background is a large banner with colour photos of unidentified individuals suffering from skin rashes on various parts of their bodies, obviously to amplify the BCAC's allegation that they were caused by the gold mining activity carried out by the respondent.

[51] In the video headlined '78pct Bukit Koman folk have cynanide related ailments' dated 21 June 2012 which can be found at the following universal source located at http:www.malaysiakini.tv/#/video/24086/78pct-of-bukit-koman-folk-have-cyanide-related ailments.html, which is accessible at the first appellant's website and published and/or caused to be published by the first appellant and/or the second appellant, the following words were spoken:

Hue Shieh Lee, a Bukit Koman action Committee member:

> A random survey covering households in the area was conducted in May 2012 and the survey actually was done by interviewing the residents from house to house and the interview was based on a standardised questionnaire with a total of 383 residence responded and results stipulated in the appendix page. So results of the survey show, 50% of the residents suffering from skin diseases and eye irritation and another 40% of the residents has coughing these results suggest that a possible cause is an air borne irritant effecting these respondents and there were 8 cases of cancer among the respondents. As specified complaints such as giddiness and fatigue was also high at about 35% and the residents are aware of the business of the gold mine and gold extracting facility RAGM near to their homes. Persistent and strong cyanide like odour has been detected by majority of the residents since the Raub plant started operation in February 2009, such odour has been, never been present in Bukit Koman in prior times.

Tan Hui Chun, an Environmental and occupational safety consultant:

> Of all the correspondent of 383 people that we surveyed 84 didn't facing any health problem, according to survey there's only 22% respondent that don't have health problem now bearing in mind that this survey was done random, we knock at each house, we not calling for anyone having problem only to be surveyed, we surveyed, we surveyed every household if they available, the resident is available. So you can see the trend that more than 88% of the ... surveyed, I mean respondents are facing more than one health issue, either it can be skin rashes, or it can be eye soreness, or they can be dizziness. Now the first five top health problem would be the skin itchiness, the dizziness or the headache, the fourth one would be fatigue and the fifth one would be cough. These constitute to more than ... they are all above 30%. When we asked a, when we doing during the survey we did compare what would be the health situation prior to the plant operation that is in February 2009. Now it is clearly indicated in appendix 2, second ... second row below. We asked a question that is, is there any health condition, is it worsen or is it the same or they are not sure about whether their health condition was any changes, and we found that especially for Kampung Bukit Koman more than 57% of the respondents mentioned that their health situation, their health condition are severely changed and they are worsen. And as for other kampong they also have changes but the numbers is a bit lower that is around 38%. Now if you're looking at two age group there's no, again there is no significant difference between the young respondent that is below 18 years old and the above 18 years old they are all both in generally around more than 58% are responded that their health conditions are deteriorated since the plant operation in 2009. Now not only a single person in the respondent are really

affected by the health, the household member that stay together with them are facing similar trend or similar sickness. A

Khim Pa, a Dermatologist:

It is quite clear that these sort of figures covering about 50% of the residents ... people survey means that there is something in the air that is irritating to the eye, to the skin. We would call that technically an irritant contact dermatitis. It is worse on exposed parts of the skin which is the face the arms and the leg and of course the eye. Now the same particle were to be inhaled into the lung it will cause coughing now that explains why 40% of the respondent are coughing whereas we only have about 5% of the resident with asthma. Now asthma is an inherent disease meaning that a person is born with a pre-disposal to developed asthma. So, asthma is about 5% that is about that kind of figure that we would have in any community. So, if you look at the figures this community have 5% of people having asthma. So, it is not anything special, that means 5 person out of people surveyed have an inborn tendency to have asthma. But 50%, 40% of the people surveyed will have coughing meaning that this people are not having asthma, they are just coughing and the cough is probably caused by something in the air as we are aware now the haze is going around the peninsular, we all experience very sensitive to haze then we have coughing, tearing and some people do developed some itchy skin. Now the residents have gone on to detect Sulphur Dioxide they have figures published showing that it has been higher than normal. They also have some machines to detect cyanide in the air and they also have published figures which also bit higher than normal and also, they have tested the water which is much higher than what is permitted by the US standard, and cyanide is actually present in the water. So in conclusion we can say that the villagers are facing something external found from the environment causing epidemic, widespread epidemic of skin diseases, eye irritation, coughing, and they now fear that if the water source is contaminated with cyanide, they are worrying about whether the slightly high increase of cancers are due to water contamination itself. Now therefore the villagers are making representations demands to the ministry of environment & natural resources way back in 2009, nothing much has been done and I think in the press statement the villagers has reiterated re-stress that these demands be met.

B C D E F G

Hue Shieh Lee, a Bukit Koman action Committee member:

We strongly hope that because this gold mine have to renew their license of authority to mine every year, 21st of August and is very close to this date, very soon we hope that when our Jabatan Mineral & Geosains granted their approval they can look into what is actually happening in this kampong seriously. H

[52] In the second video with the link of http://www.malaysiakini.tv/#/video/24267/raubfolks-to-rallyagainst-poisonous-gold-mine.html, which was published and/or caused to be published by the first appellant and/or second appellant, the following words (English translation) were spoken: I

Tengku Shahadan (Deputy Chairperson Himpunan Hijau Raub)

More than a thousand days have passed since the RAGM gold plant started to reap profits by extracting gold using cyanide which is life-threatening, and no doubt the owners of the mine are laughing all the way to the bank. They couldn't care less about the people of Raub, especially those from Bukit Koman who live in suffering and fear. Many who were previously healthy have now fallen ill. They complain of unbearable itch, acute rashes, continuous coughing, other worrying symptoms and what's even more upsetting, all complaints and appeals to the authorities have not received appropriate actions. They have done nothing to prove that the factory is safe. The Government has allowed a factory which is most likely a pollutant, it operates 24 hours a day, 7 days a week non-stop whilst the residents who object are pressured and made fools of in the past three years. All of this must be stopped. We are not against profitable businesses. It's just that this gold plant operates in an unethical manner and has polluted the environment and in fact endangering our lives. Whatever challenges lie ahead, we must uphold our right to live a healthy life without fear. Let us all join the Raub green rally on 2 September 2012, at 2 pm to champion, fight the dirty gold mine, which uses cyanide. Let us work together for a greener future.

Zulkefli Mohamad Omar (PAS environmental bureau chief):

On behalf of the PAS central committee, I will make sure that many PAS leaders will participate. We will also promote this all over the country and we will call all states to send representatives [inaudible] to increase the number of attendees at the rally. And so far, the rallies we have held with other NGO partners, the green rally [inaudible] I think this cyanide issue is not a new issue, it's been around for a while, except that the date has been set this 2 September, a Hari Raya date [inaudible] perhaps we can celebrate Hari Raya there. And we will begin with all our capacity ... ah ...

Ronny Liu (Selangor state executive councilor):

Any struggle takes time. It is not easy as the central government is stubborn. Ng Yen Yen is also stubborn. Liow Tiong Lai also stubborn [inaudible] everyone is stubborn. Adnan is also stubborn. So, with such a stubborn government, our struggle will take time before we emerge victorious. [inaudible] but there is still a chance for us to win. It just takes time. So, 1000 days is how many years? Perhaps the time has not come. Like water, when we want to heat up water [inaudible] water, it has to reach 100 degrees, only then will it be hot, only then will it reach boiling point. So perhaps we have to continue our struggle until we reach the boiling point.

[53] Judging from the thrust and tone of the three articles and two videos as a whole and objectively, the way the reports were presented was anything but neutral. It is also plain and obvious that the appellants had adopted the articles and videos as their own by subscribing to a belief in the truth of the defamatory imputations. On the facts, the Court of Appeal was therefore justified in coming to the following conclusions:

[74] Applying the principles as enunciated above, and after perusing the evidence and the articles and videos as a whole, and viewing it objectively, we are of the considered view that the respondents had failed to meet the requirements of the defence of reportage for the following reasons:

(a) the respondents reported only the version of one side of the dispute, that is the version of the Bukit Koman community and the opposition politicians;

(b) since the allegations were extremely serious and damaging and may lead to criminal prosecutions and civil suits being brought against the appellant if the allegations were true, no attempts were made to contact any independent bodies such as the Department of Environment, the Department of Minerals and Geoscience or the Ministry of Health prior to publication of the articles and videos to show that the respondents were neutral and not taking sides;

(c) the cavalier and reckless attitude of the respondents is evident and they are as follows:

(i) as editor-in-chief, DW1 did not even read the articles and videos before they were published;

(ii) no attempts were made by the respondents to view any primary documents before publishing the articles and videos; and

(iii) at no time did the first respondent sight the so-called survey prepared by the BCAC;

(d) the second article and the first video carried allegations by Ms Hue Shieh Lee made in the *Malay Mail* article dated 31 July 2012 that the ill health of the villagers of Bukit Koman was caused by the appellant's mining activities. Such allegations have since been refuted by the Ministry of Health and published in the national newspaper. The Ministry of Health's Press Statement also cited Ms Hue Shieh Lee as having agreed that cyanide was not the cause of the villager's ill health. With that admission, it is plain and clear that all the allegations in the second article and first video are false and without basis. In these circumstances, the respondents should have contacted the appellant to get the appellant's response and side of the story so as to maintain a balanced reporting. The respondents failed to do this;

(e) the tone of the third article was extremely accusatory with imputations and odious allegations on the appellant. Such tone is not neutral, is unbalanced and is unfair as it did not carry both versions to the dispute. It merely carried the version of the opposition politicians who, it would appear, were exploiting the issue at Bukit Koman to gain political mileage;

(f) that Wong Kin Hoang has since apologized for his statements which unfairly accused the appellant of polluting the environment 24 hours every day and that the appellant has harassed those who speak up against it on the basis that there is no justification. Despite such apology there was no apology or retraction by the respondents; and

(g) similarly, the second video also falls foul of the defence of reportage for the same reasons as above.

[75] To summarise, the respondents had failed to show that in the ongoing dispute, the allegations made against the appellant were being reported in a fair, disinterested and neutral manner without the respondents embracing, garnishing and embellishing the allegations. In other words, the reporting of the impugned statements were unbalanced since the version of one side, (that of the Bukit Koman community and the opposition politicians), were showcased and given prominence. Though there were five other neutral articles being published in the respondent's website at about the same time as the publication of the impugned statements, these five articles, to our minds, are neutralized by the impugned statements. This is so since the impugned statements in the articles and videos were not merely couched in a sarcastic tone which may be permissible as a journalistic device but couched in an extremely accusatory and damaging tone which goes beyond mere neutral reporting. In fact, in comparison to the other articles reported on the same matter in other newspapers or media, the reporting by the respondents assert something more sinister on the part of the appellant. As such, the respondents impugned publications were slanted towards bias against the appellant.

[76] Thus, after perusing the articles and videos and taking it as a whole and viewed objectively, we are of the considered view that the respondents had not only embellished the allegations but have embraced and adopted them as the truth and as their own. In such circumstances, the respondents are not entitled to avail themselves to the defence of reportage. In the upshot, we find the learned trial judge in her judgment had clearly failed to judicially appreciate in part the relevant evidence before her and had erred in misconstruing the facts and law on qualified privilege, responsible journalism and reportage which errors merit our appellate intervention.

[54] By adopting the statements in the articles and the videos and making them their own and in failing to report the story in a fair, disinterested and neutral way, the appellants had forfeited their right to the protection of reportage. The Court of Appeal was therefore correct in finding that the High Court was wrong in holding that the appellants had succeeded in making out the defence of reportage.

[55] It has to be said, with due respect to the learned High Court judge, that she had fused together the defence of reportage and the *Reynolds* defence of responsible journalism, merging them together as if they are one and the same without directing her mind to the distinctive features of reportage which are not compatible with the *Reynolds* defence of responsible journalism or qualified privilege. This is clear from her observations at paras [21], [27] and the conclusion that she reached at para [33] of her judgment:

[21] The most important aspect of the *Reynolds* privilege defence, *be it responsible journalism or reportage* ... (Emphasis added.)

[27] I am aware of the general principle that a person who repeats the defamatory

words of another will also be liable to the person defamed. However, it has been said that the *Reynolds privilege of reportage* appears to be the exception to the so-called general rule of repetition. (Emphasis added.)

[33] It is therefore my judgment that based on the reasons stated, the defendants have succeeded in their defence of qualified privilege, *that is responsible journalism and reportage — the Reynolds privilege*. (Emphasis added.)

[56] It is patently clear that the learned judge was equating the defence of reportage with the *Reynolds* defence of responsible journalism or qualified privilege, making no distinction between the two defences.

[57] Further, even though the learned trial judge was mindful of the ten factors listed by Lord Nicholls in *Reynolds*, nowhere in her judgment did she allude to the evidence relating to these factors in determining whether the defence of reportage had been established by the appellants. There was only a fleeting reference to the availability of the defence when she said:

The defence of reportage is therefore available to the defendants because the public interest here lies not in the truth of the contents of the said Articles and Video, but on the fact that they had been made. The two press conferences held by BCAC themselves, in my view, are matter of public interest.

[58] Essentially what the learned trial judge was saying in relation to the defence of reportage was this:

(a) the first article made no allegations or criticisms against the respondent. In other words, there was no embellishment of the contents of the article by the appellants;

(b) with regard to the second and third articles with link to the second video, there is no evidence that the appellants adopted the contents of the articles as their own and that the articles and videos were matters of public concern where the public in general has the right to know the information and the appellants as journalists were under 'at least a moral duty to publish the same';

(c) the publication of the second and third articles and the two videos was not so much concerning the truth of their contents, but rather the fact that they were 'reproduction' of the two press conferences held by the BCAC; and

(d) the public interest lies not in the truth of the contents of the articles and videos but in the fact that they had been made.

[59] Assuming for a moment and for the sake of argument that the defence of reportage may be relied on without being pleaded, the question then is whether there was sufficient judicial appreciation of the evidence by the learned

trial judge in coming to the conclusion that the defence of reportage had been established by the appellants.

[60] What is clear from the judgment is that in determining whether the defence of reportage had been established, the focus of the learned judge's attention was on the public interest element of the defence of reportage without sufficiently addressing her mind to the relevant evidence that goes to prove or to disprove the elements that consitute the defence of reportage.

[61] It is true that the list of ten factors outlined by Lord Nicholls in *Reynolds* is not exhaustive and is merely illustrative but it was wrong for Her Ladyship to ignore the evidence relating to the ten factors. As Ward LJ said in *Gable*:

> [6] To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from the *Reynolds case* [2001] 2 AC 127, the burden being on the defendants. In this way the balance between article 10 and article 8 can be maintained. All the circumstances of the case and the ten factors listed by Lord Nicholls *adjusted as may be necessary for the special nature of the reportage must be considered* in order to reach the necessary conclusion that this was the product of responsible journalism. (Emphasis added.)

[62] The important point to note with regard to *Gable* is that in dealing with the defence of reportage, 'All the circumstances of the case and the ten factors listed by Lord Nicholls in Reynolds *adjusted as may be necessary* for the special nature of reportage *must be considered*'. The ten points set out in *Reynolds* are as follows:

(a) the seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual is harmed, if the allegation is not true;

(b) the nature of the information, and the extent to which the subject matter is a matter of public concern;

(c) the source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;

(d) the steps taken to verify the information;

(e) the status of the information. The allegation may have already been the subject of an investigation which commands respect;

(f) the urgency of the matter. News is often a perishable commodity;

(g) whether comment was sought from the plaintiff. The plaintiff may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary;

(h) whether the article contained the gist of the plaintiff's side of the story;

(i) the tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact; and

(j) the circumstances of the publication, including the timing.

[63] From the authorities, it is clear that apart from public interest, neutral reporting is the single most important element in the defence of reportage, which is not an element in the *Reynolds* defence of responsible journalism. In *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, the Court of Appeal, in affirming the trial judge's decision, held that the defence of reportage is lost where the defendant fails to fully, fairly and disinterestedly report the allegations and where the defendant adopts the allegations as true:

> [30] The judge correctly observed in paragraph 126 that, when applying *Reynolds*, it is always important to concentrate on the particular facts in hand. He distinguished the facts in *Al-Fagih* from those here. In particular he noted (again correctly) that in that case the newspaper had not adopted the allegation or implied that it was true and that it was one of those cases where the mere fact that the allegations were being made was of public interest and importance, even though the reader was not in a position to determine whether the allegations were true or false.
>
> [31] In paragraph 130 the judge identified a number of significant potential distinctions between the two cases. He said:
>
> > First, it is necessary for me to consider whether The Daily Telegraph did, or did not, adopt any defamatory imputation or imply that it was true. Secondly, this was not a case of politicians or other public figures making allegations and cross-allegations about one another, so as to give rise to a dispute which would itself be of inherent public interest. Thirdly, this is not a case where one or other, or both, of two persons could be shown to be disreputable by the very nature of the allegations being made (whether true or false). Fourthly, I shall need to consider whether The Daily Telegraph was 'fully, fairly and disinterestedly' reporting the content of the Baghdad documents and Mr Galloway's response to those allegations. Fifthly, it would clearly be significant if they went beyond reporting them and made independent allegations or inferences
>
> We agree.

[64] In *Malik v Newspost Ltd and others* [2007] EWHC 3063 (QB) it was held that where both sides of the dispute were not neutrally reported, reportage cannot be a defence:

> [15] ... Moreover, if both sides of the controversy were fairly and disinterestedly reported, there might be a reportage defence: see e.g. *Roberts v Gable* [2007] EMLR 16. The facts of the present case, however, do not fit into either of these forms of privilege.'

[65] In *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 3 AMR 514, Harmindar Singh JC (as His Lordship then was) held, on the facts of the case:

> [78] After due consideration I am not persuaded that this was indeed a case of reportage. The article is not about a continuing dispute between parties. Even if it can be said to be a dispute, there is only one version of one side. The reason why reportage is available as a defence is because both versions of defamatory allegations as well as the responses are reported, and the journalist takes no further part in putting forward his or her view of which is the truth. This certainly is not the case here.
>
> [79] Seen as such, the article is certainly not put forward in a fair, disinterested and neutral fashion because it does not contain the version of the other side of a dispute, if at all there is a dispute. I also do not think that this is a neutral report because what SD1 is trying to do, as she herself admits, is to explore the links between APPC, Douglas Paal, the funding by the Malaysian government and the plaintiff. Her intention, therefore, is not mere neutral reporting but to assert something more sinister on the part of the plaintiff than what had appeared in the New Republic article. She was in a sense adding her own spice and putting 'meat on the bones' (see *Associated Newspapers Ltd & Ors v Dingle* [1964] AC 371 at p 411 per Lord Denning) and making what I considered to be independent inferences. I am therefore unable to accept her subsequent assertions that her article was a mere reproduction.

[66] As for video recordings, the respondent's contention was that where they are linked to articles which are clearly biased and derogatory, that is effectively adoption or embellishment of the videos and articles by the publisher and that the choice to include certain videos to the exclusion of others shows the position of the journalist having adopted a view on the matter. I agree. As Lord Reid said in *Daily Telegraph*, repeating someone else's libelous statement is just as bad as making the statement directly.

[67] Viewed in the context of the sustained campaign by the BCAC against the respondent, the publication of the defamatory articles and videos in the present case clearly shows that the appellants had taken a position in favour of the BCAC in their reporting, which negates any assertion on their part that they had been fair, disinterested and had adopted a neutral approach in their reporting. The reporting by the appellants implied that the defamatory statements made by the BCAC were true and accurate when they were not.

[68] As the Court of Appeal correctly pointed out, the articles and videos bear an accusatory tone which leaned in favour of giving wide political coverage to politicians from the opposition (at that time) and the BCAC's unverified and false assertions. That alone disentitled the appellants to the protection of reportage. They must then show, if they could, that it was a piece of responsible journalism even though they did not check the accuracy of the published

information: *Gable.*

[69] The videos relating to statements made by members of the BCAC during the press conferences were also capable of being embellished or adopted if they were published in a way that was accusatory and damaging in tone. This is especially so when considered together with articles which were disparaging in tone. In *Jameel*, Baroness Hale (later President of the UK Supreme Court), inter alia, held as follows:

> 149. Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. But one would normally expect that the source or sources were ones that the publisher had good reason to think reliable, that the publisher himself believed the information to be true, and that he had done what he could to check it. We are frequently told that 'fact checking' has gone out of fashion with the media. But a publisher who is to avoid the risk of liability if the information cannot later be proved to be true would be well-advised to do it. Part of this is, of course, taking reasonable steps to contact the people named in the comments. *The requirements in 'reportage' cases, where the publisher is simply reporting what others have said, may be rather different, but if the publisher does not himself believe the information to be true, he would be well - advised to make this clear. In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on.*(Emphasis added.)

[70] Therefore, the publisher who seeks the protection of reportage as a defence must make it clear that he does not himself believe the information to be true. The appellants did not make their position clear both in their statement of defence and in their evidence in court. Silence is not an option where the statements are defamatory, derogatory and accusatory of the claimant. As to what amounts to adoption or embellishment of statements as the truth, Ward LJ's dicta in *Charman* is instructive:

> [56] Those objections apply with equal force here. The single meaning principle is highly artificial and should not be imported to decide the quite different question of whether or not the allegations had been adopted. The issue is whether or not, looking at the article as a whole, the author made the allegations his own. This question is intimately bound up with other facets or other ways of looking at the same fundamental question in the same inquiry. Did he make the allegations his own *by espousing or concurring in the charges in the source material* or was it a piece of neutral, disinterested, impartial reporting? Was it a full, fair and accurate report or was it embellished or distorted? Has the author engaged in comment, description or elaboration of his own, as opposed to permissibly adding colour to the published account? Having regard to material additions to and omissions from the source material, can the resultant piece of journalism still fairly be said simply to be a report of the source material or has the author taken it over and transformed it? These are questions which the ordinary reader, not one with particular knowledge, still less the trained lawyer, must answer. If one can treat them in that common sense way, as 'jury questions' if you like to demystify them, then one is able to avoid the

A artificiality of the single meaning rule and the true elements of the reportage defence will be addressed. (Emphasis added.)

B **[71]** Thus, if the journalist espouses or concurs with the defamatory statements or imputations, he loses the protection of reportage. Espousing or concurring with the defamatory statements or imputations need not be express. They can be implied, for example by using headlines that promote and give prominence to the defamatory statements or imputations, taking into account the tendency of the general public to read only the headlines.

C

[72] Taken objectively and from the standpoint of a reasonable and neutral bystander, there can be no argument that the tone of the articles and videos published by the appellants was accusatory, damaging and disparaging. In the absence of any caveat, express or implied, by the appellants that they did not
D subscribe to a belief in the truth of the articles and videos, they must be taken to have adopted them as their own.

[73] Having thus disentitled themselves of the protection of reportage, the question is whether the appellants had taken appropriate and reasonable steps
E to verify the truth and accuracy of the articles in order to avail themselves of the *Reynolds* defence of responsible journalism, which was their pleaded defence.

[74] To digress a little, it is interesting to note that in the United Kingdom the *Reynolds* defence of responsible journalism has been abolished by s 4(6) of
F the UK Defamation Act 2013 ('the UK Act'). With the abolition, there are now only two requirements that the defendant in the UK needs to fulfill before he can avail himself of the statutory defence, namely:

(a) the statement complained of was, or formed part of, a statement on a
G matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

H (See s 4(1).)

[75] Subsection 4(3) of the UK Act is pertinent. It provides that if the statement complained of was, or formed part of, an 'accurate and impartial account' of a dispute to which the claimant was a party, the court must in
I determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, *disregard* any omission by the defendant to take steps to verify the truth of the imputation conveyed by it. The Explanatory Note to sub-s (3) reads:

Subsection (3) is intended to encapsulate the core of the common law doctrine of

> *'reportage'* (which has been described by the courts as 'a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper' 10). In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture. In determining whether for the purposes of the section it was reasonable for the defendant to believe that publishing the statement was in the public interest, the court should disregard any failure on the part of a defendant to take steps to verify the truth of the imputation conveyed by the publication (which would include any failure of the defendant to seek the claimant's views on the statement). This means that the defendant newspaper for example would not be prejudiced for a failure to verify where subsection (3) applies. (Emphasis added.)

[76] This appears to be a clear departure from the *Reynolds* defence of responsible journalism by doing away with the need to take steps to verify the truth and accuracy of the imputation conveyed by the publication, in line with Parliament's intention to abolish the common law defence. But the UK Act also provides that although the defendant is not required to take steps to verify the truth of the defamatory statement provided he reasonably believed that publishing the statement complained of was in the public interest, he must still show that the statement was or formed part of an *accurate and impartial* account of the dispute between the parties.

[77] Conversely, this means that if the statement was not or was not part of an *accurate and impartial* account of the dispute between the parties, the defendant cannot avail himself of the defence accorded by s 4(1) of the UK Act. Impartiality is therefore a key characteristic of the statutory defence, in conformity with the defence of reportage.

[78] Coming back to the present case, the main reason why the learned trial judge found the *Reynolds* defence of responsible journalism to have been established by the appellants in respect of the first article was because she found that the act of the second appellant contacting the Chairman of the BCAC prior to the publication of the article was sufficient in the circumstances of the case to constitute responsible journalism. According to her:

> This is because the first article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman residents regarding the air pollution which they suspect was caused by the plaintiff's plant. The defendants therefore have satisfied the test of responsible journalism.

[79] As for the second and third articles, she said the public had a right to know the information and the appellants as journalists had 'at least a moral duty to publish the same'.

[80] The second limb of the *Reynolds* defence of responsible journalism or qualified privilege requires the appellants to satisfy the court that the steps to gather, verify and publish the information were responsible and fair. However, from the evidence of DW1, the editor-in-chief of the first appellant, it is clear that the appellants had failed to take steps, let alone reasonable steps, to verify the contents of the articles and videos, as apparent from the following:

(a) no attempt was made to independently verify if the information in the articles and videos were true;

(b) no attempt was made to contact independent bodies such as the Department of Environment, the Department of Minerals and Geoscience or the Ministry of Health prior to publication of the articles and videos;

(c) as editor-in-chief, DW1 did not even read the articles and watched the videos before they were published;

(d) no attempt was made to view any primary document before publishing the articles and videos;

(e) at no time did the first appellant have sight of the so-called survey prepared by the BCAC;

(f) no attempt was made to retract any of the articles and videos despite apologies being issued by both Wong Kin Hoong and Hue Fui How; and

(g) the appellants were selective in the contents of the articles and videos and as a result did not write balanced articles and gave prominence to the views of the BCAC only.

[81] DW1 had also admitted in cross-examination to the following:

(a) his reporting on the respondent started since 2008 right up to 2012, and further agreed that the first appellant had ample time of five years to check whether the sources of the information were correct (therefore the adage that news is a perishable commodity does not assist the appellants);

(b) he absolutely had no concrete scientific evidence to say that cyanide pollution was the cause of the ill health of the villagers in respect of the headline of the second article;

(c) there was absolutely no basis for what was stated in paras 1 and 2 of the articles in so far as scientific and technical evidence is concerned;

(d) he did not at any time look at the so-called survey prepared by the BCAC;

(e) neither he nor DW2 verified whether the unusual yellow dots emanated from the respondent's mining activities;

(f) that he and DW2 did not obtain the readings from the so-called monitoring devices alleged by Mr Wong King Hoong before publishing the first article although it was important to ascertain the readings on the alleged monitoring device; and

(g) that in the articles in 2007–2013, he espoused essentially the views of the BCAC in particular.

[82] DW2 on his part had admitted to the following in cross-examination:

(a) by writing the first paragraph of the first article, he merely accepted the unverified words of Mr Wong King Hoong, the blogs and the media reports;

(b) he did not ascertain if the facts contained in para 5 of the first article that birds, lizards that have been found dead that occurred due to the commencement of the respondent's mining activities;

(c) he had no evidence of a scientific or technical nature that the deaths of the birds, lizards was due to the respondent's gold mining activities;

(d) he did not even visit Bukit Koman to ascertain the fact that there were birds, lizards which were found dead;

(e) he was told by Mr Wong Kim Hoong that the yellow spots came from the mining operations yet he re-published what Mr Wong King Hoong said to him without verifying if what what Mr Wong King Hoong told him was based on facts which were true;

(f) he was not in a position to contradict the statement of PW2, an expert metallurgist that the presence of the yellow powdery spots and dots measuring up to 8mm and the unbearable stench could not be scientifically attributed to cyanide or its degradation by products due to extremely low concentration of HCN gas; and

(g) he was not in a position to tell the court what was the technical, medical, scientific evidence that he relied on to say that the unusual yellow dots were responsible for the skin, eyes, respiratory illness of the residents of Bukit Koman.

[83] On the proved facts therefore, the learned trial judge was clearly wrong in finding as a matter of law that the articles and videos were published on an occasion of qualified privilege. The appellants' failed attempts to get clarification from a representative of the respondent in connection with the articles and videos is not a valid excuse in all the circumstances of the case to go ahead with the publication of the defamatory articles and videos. After all, the respondent had explained why it would not comment on the stories, and this was because of the pending judicial review application.

[84] But more importantly, it cannot be the philosophy behind *Reynolds* that if the claimant refuses to comment on the story, the journalist is thus given a free pass to publish the material in a way that is defamatory of the claimant. The burden remains with the journalist to verify the truth and accuracy of what is published although not in every detail.

[85] In any event, since the allegations in the articles and videos had been proved to be untruths and were defamatory of the respondent, the fact that the respondent declined comment on the stories is of no consequence. To reiterate what Lord Hobhouse said in *Reynolds*, no public interest is served by communicating and receiving untruths. There were many aspects of the articles and videos that were verifiable and which needed independent verification but which the appellants did not bother to check for truth and accuracy.

[86] The learned trial judge's finding was therefore plainly wrong and the Court of Appeal was justified in interfering with the finding in order to prevent a miscarriage of justice. The Court of Appeal had given sound reasons for disagreeing with the decision of the High Court in relation to the first article, which reasoning applies equally well, in my opinion, to the second and third articles:

> [39] The trial judge found that the first article did not make any allegation or criticism against the appellant nor was there any embellishment to its contents. We disagree. The article made very serious allegations that the appellant's gold mining activities using cyanide which is a hazardous chemical had caused ill health to the villagers, death of wildlife and vegetation, and environmental pollution of Bukit Koman.
>
> [40] The tone of the article is extremely accusatory and damaging to the appellant. As stated earlier, it accused the appellant as being the cause of the villager's alleged ill health, death of wildlife and vegetation and environmental pollution of Bukit Koman. In fact if what is stated in the article is true, the appellant may be liable to criminal prosecutions or civil suits and consequently may be fined or be ordered to close down the mines and its license revoked. These are potential repercussions which the appellant may face due to the publication of the article. Thus in such circumstances, due to the seriousness of the allegations, responsible journalism warrants a fair and balanced reporting where the accused — appellant should be given an opportunity to answer the accuser — respondents. In this context, the respondents are required to take reasonable steps to verify the information by contacting other experts in the matter or at least contact the appellant to get its side of the story. This, the respondents failed to do and should thus bear the consequence of their failure. Contacting the Chairman of the BCAC in these circumstances was grossly inadequate. As such the respondents cannot rely on the defence of responsible journalism since the respondents failed to meet the relevant ten points test as propounded in *Reynolds*.

[87] The appellants criticised the judgment of the Court of Appeal for

requiring them to meet all ten requirements listed by Lord Nicholls in *Reynolds*. This according to learned counsel for the appellants was a misapplication of *Reynolds*. With due respect, the criticism is without basis. The Court of Appeal was clearly mindful that the ten-points test laid down in *Reynolds* is illustrative and not exhaustive. This can be seen from the following paragraph of the judgment:

> [30] We now come to the second test. Have the respondents exercised responsible journalism by taking steps to gather, verify and publish the information in a responsible and fair manner. This is where the ten-points test as set out in *Reynolds* by Lord Nicholls comes in. It must be emphasized that the ten-points or ten factors are illustrative and not exhaustive, and the weight to be given to these and other relevant factors, will vary from case to case.

[88] In any case, all ten factors listed in *Reynolds* must be considered, with the necessary adjustments, for the 'special nature' of reportage: *Gable*. It was further contended by the appellants that the Court of Appeal erred in holding that there was insufficient and/or no verification of the articles and videos by the appellants prior to publication. The plain truth is there was no such verification in the true sense of the word. It would be against the totality and weight of the evidence if the Court of Appeal were to find otherwise.

[89] I have alluded to instances of failure by the appellants to verify the truth and accuracy of the articles and I shall not repeat them. But if another example is needed, it is where DW1, the editor-in-chief of the first appellant was asked in cross examination whether everything that the Bukit Koman folks said in relation to the first article was true, his answer was that he would not know what was true and what was false in the first article. He just assumed that what they said was true and he published it. This is irresponsible rather than responsible journalism.

[90] As for leave questions 8 and 9 (damages), the Court of Appeal had awarded damages in the sum of RM200,000 as general damages for loss of goodwill and vindication of reputation. The appellants' contention was that general damages in defamation for loss of reputation with loss of goodwill as a component cannot be awarded to a corporate claimant in insolvency, which was the status of the respondent at the time of the award.

[91] It was submitted that the Court of Appeal failed to distinguish between a personal claimant and a corporate claimant suing for damages in defamation, citing *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1964] AC 234 for the proposition that 'a company cannot be injured in its feelings; it can only be injured in its pocket'. In that case Lord Reid went on to state the need for there to be a connection between the libel and the loss of goodwill:

A Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured. But in so far as the libel has, or had probably, diminished its profits.

B **[92]** It was pointed out that the respondent had not led any evidence on this point of how the alleged defamation had injured 'its pocket'. It was submitted that in the absence of any pleading or evidence that the defamation caused the winding up of the respondent or otherwise, the award of general damages of RM200,000 for loss of goodwill and reputation was arbitrary and unsustainable in law.

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[93] In response, learned counsel for the respondent submitted that the respondent's insolvency is inconsequential, for the following reasons:

D (a) damages are assessed from the date of the cause of action; and

(b) goodwill is capable of existing in an insolvent company and in addition, both damages for loss of goodwill and vindication of reputation can be awarded to the company.

E **[94]** It was submitted that a plaintiff company is not required to show actual damage to obtain damages. It is the reputation of the corporation which is the asset of value which if it had been tarnished by the libel, needs to be compensated for. Reference was made to *Jameel*, where the House of Lords, inter alia, decided as follows:

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[119] Defamation constitutes an injury to reputation. Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Where reputation is traduced by a libel 'the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights' (Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524 at 528). It is accepted that the rule

G applies and should continue to apply to individuals. But it is argued that it should no longer be applied to corporations. Corporations, it is said, have no feelings to be hurt and cannot feel shame. If they are to sue for libel, they should be required to show that the libel has caused them actual damage.

H [120] These arguments, in my opinion, miss the point. The reputation of a corporate body is capable of being, and will usually be, not simply something in which its directors and shareholders may take pride, but as asset of positive value to it.

I [121] It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely to be inconclusive. Causation problem would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if the libel had

not been published? How can a company about which some libel, damaging to its reputation, has been published ever obtain an interlocutory injunction if proof of actual damage is to become the gist of the action?

[122] There is no doubt that, as the case law now stands, *a libel is actionable per se at the suit of a corporation as it is at the suit of an individual, without the need to prove that any actual damage has been caused*. In the *South Hetton Coal Co Ltd case* [1894] 1 QB 133 the plaintiff, a colliery company, complained of a libel that had attacked the company in respect of its management of company houses in which some of its colliery workers lived. The Court of Appeal held that the libel was actionable per se and, at p 140, that '... the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage'. (Emphasis added.)

[95] It is therefore established law that a company can recover general damages for loss of goodwill and vindication of reputation without having to prove actual loss. In any case, no argument was raised before the Court of Appeal by the appellants as to the financial standing of the respondent and that it was in the process of a voluntary winding up as a basis for the respondent not having a good reputation and/or being disentitled to general damages. It therefore follows that the appellants must be precluded from taking such argument before this court in so far as leave questions 8 and 9 are concerned. Ultimately, it is the status of the respondent at the time of the filing of the writ that is material.

[96] For all the reasons aforesaid, my answers to the leave questions are as follows:

Leave question 1 — Affirmative, that is to say, reportage is in law a separate defence from qualified privilege or the *Reynolds* defence of responsible journalism and is to be treated as being mutually exclusive.

Leave question 2 — Affirmative, that is to say, the defence of reportage needs to be pleaded separately from the plea of responsible journalism.

Leave question 3 — Affirmative, that is to say, a defendant is obliged to plead either reportage or responsible journalism and not plead them in the alternative.

Leave question 4 — Negative, that is to say, the defence of reportage which is in law based on an on-going matter of public concern is not sufficiently pleaded if it is stated by the defendant that the publications 'were and still are matters of public interest which the defendants were under a duty to publish'.

Leave question 5 — Affirmative, that is to say, the proper test to determine if

A the defence of reportage succeeds or otherwise is the test of adoption by the journalist of the publication as true and not for the journalist to establish his neutrality by independent verification.

B Leave question 6 — Affirmative, that is to say, in an on-going dispute, the impugned articles or videos ought to be considered together with previous and continuing publications of the news media on the same subject matter of public concern in determining the defence of reportage and provided always that the defendant complies with the reportage rule.

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Leave question 7 — Affirmative, that is to say, the mere publication of such videos could be held to be embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media, unless the publisher makes it clear that he does not subscribe to a belief in the truth and
D accuracy of the defamatory statements or imputations.

Leave question 8 — Affirmative, that is to say, it is proper to award general damages for loss of goodwill and vindication of reputation to a plaintiff
E company that has independently been subjected to a voluntary winding up by its creditors.

Leave question 9 — Affirmative, that is to say, loss of goodwill can be recovered as a component of defamatory damages by a plaintiff company that has gone
F into insolvency.

[97] In the circumstances, the appeal is dismissed with costs to the respondent. The decision of the Court of Appeal is affirmed. My learned sisters
G Zaleha Yusof FCJ and Hasnah Mohammed Hashim FCJ have had sight of this judgment in draft and have agreed to it. This therefore is the majority judgment of this court.

Harmindar Singh FCJ (delivering dissenting judgment of the court):

H

INTRODUCTION

[98] This appeal raises issues concerning certain important aspects of the law of defamation . The nucleus of the arguments advanced in the appeal concern
I the defence of reportage in the context of qualified privilege and the *Reynolds* defence of responsible journalism (see *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127; [1999] 4 All ER 609). Also in issue is the role of the media in invoking freedom of expression in advancing the weighty interest of the public's 'right to know' and especially, in this context, the extent to which

the media ought to be allowed to provide such information to the general public.

[99] This appeal arises from the reversal by the Court of Appeal on 11 January 2018 of the decision of the High Court at Kuala Lumpur delivered on 10 June 2016 . After a full trial, the High Court had dismissed the respondent's claim for defamation and malicious falsehood in relation to the publication of three articles and two videos by the appellants. The articles and videos pertain to news reports of the gold-mining activities of the respondent and the risk to the health, well-being and safety of the neighbouring Bukit Koman community as a whole.

[100] This appeal was then filed pursuant to the granting of leave of the following questions:

1. Whether reportage is in law a separate defence from qualified privilege or the *Reynolds* defence of responsible journalism and whether it is to be treated as being mutually exclusive?
2. Whether the defence of reportage being an off-shoot of the *Reynolds* defence of responsible journalism needs to be pleaded separately from the plea of responsible journalism itself?
3. Whether a defendant is obliged to plead either reportage or responsible journalism and not plead them in the alternative?
4. Whether the defence of reportage which is in law based on an on- going matter of public concern is sufficiently pleaded if it is stated by the defendant that the publications 'were and still are matters of public interest which the defendants were under a duty to publish'?
5. Whether the proper test to determine if the defence of reportage succeeds is the test of adoption by the journalist of the publication as true and not for the journalist to establish his neutrality by independent verification?
6. In publishing video recordings of statements made by third parties in a press conference, whether the mere publication of such videos could be held to be an embellishment of the allegations or an embracing or adoption of such statements as the truth by the news media?
7. Whether in an ongoing dispute, the impugned article or videos ought to be considered together with previous and continuing publications of the news media on the same subject matter of public concern in determining the defence of reportage?
8. Whether it is proper to award general damages for loss of goodwill and vindication of reputation to a plaintiff company that has independently been subjected to a voluntary winding up by its creditors?
9. Whether loss of goodwill can be recovered as a component of defamatory damages by a plaintiff company that has gone into insolvency?

A THE MATERIAL FACTS

[101] The relevant background facts leading to the filing of the present appeal are well stated in the court judgments and in the parties' submissions. The salient facts, as far as they are relevant to the present appeal, are reproduced as follows. For convenience, the parties will be referred to as they were in the court of first instance or by their names as abbreviated interchangeably.

[102] The plaintiff was a company involved in operating a gold mine located in Bukit Koman, in the district of Raub, State of Pahang. Prior to the filing of this appeal, and in fact during the hearing of the appeal in the Court of Appeal itself, the plaintiff had been voluntarily wound up and remains in liquidation to this day. The first defendant ('Mkini') is a company that owns and operates an online news portal known as Malaysiakini on its website at www.malaysiakini.com. The second defendant is the assistant news editor of Malaysiakini. The third defendant is the senior journalist of Malaysiakini. The fourth defendant was, at the material time, an intern at Malaysiakini and was pursuing a degree in Bachelor of Arts in Journalism.

[103] The plaintiff's suit against the defendants was for defamation and malicious falsehood in respect of three articles and two videos published by the first defendant in 2012 on its Malaysiakini portal. In essence, these articles and videos alleged that the plaintiff had used cyanide in its gold mining activities which had caused serious illness to the villagers and death of wildlife and vegetation and environmental pollution in Bukit Koman. The said articles and videos in summary were:

(a) an article titled 'Villagers fear for their health over cyanide pollution' published on 19 March 2012 ('the first article') which was authored by the second defendant;

(b) an article titled '78 pct Bukit Koman folk have 'cyanide-related' ailments' published on 21 June 2012 ('the second article') which was authored by the third defendant;

(c) a video presentation that was linked with the second article published on 21 June 2012 ('the first video');

(d) an article titled 'Raub folk to rally against 'poisonous gold mine' published on 2 August 2012 ('the third article') authored by the fourth defendant; and

(e) a video presentation that was linked with the third article published on 2 August 2012 ('the second video').

[104] The plaintiff claimed that the articles and videos contained defamatory material which were false and were published by the defendants maliciously

with intent to injure the plaintiff's reputation, trade and business. The impugned parts of the articles and videos and the imputations that arose were set out in the statement of claim and were carefully noted by the High Court and the Court of Appeal in their respective judgments as published in the law journals at *Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors* [2016] 12 MLJ 476; [2016] 7 CLJ 124 and [2018] 4 MLJ 209.

[105] The defendants, on the other hand, claimed in their defence that the words complained of or the impugned statements in the said articles and videos were not defamatory in nature of the plaintiff. The defendants principally relied on the defence of qualified privilege and fair comment. As for the defence of qualified privilege the defendants asserted in their arguments that they have exercised responsible journalism and/or in accordance with the defence of reportage. The defendants maintained that the said articles and videos were published pertaining to matters or issues of public interest not just in Raub but of a national scale.

AT THE HIGH COURT

[106] After a trial involving 15 witnesses, the learned trial judge found that the words complained of in all the three articles and the two videos were defamatory of the plaintiff. The learned judge also found that although the articles and videos in question were defamatory, the defendants had successfully raised or availed themselves to the defence of qualified privilege which encompassed both the *Reynolds* privilege defence of responsible journalism and the defence of reportage.

[107] In relation to the question of whether the matters complained of were defamatory, the learned judge concluded as follows:

> [16] It is therefore my judgment that the words complained of as stated by the plaintiff in paras 8, 11, 17, 20 and 25 of the statement of claim are capable of being defamatory of the plaintiff in their natural and ordinary meaning. I agree with the plaintiff's learned counsel that the said articles and videos impute to the plaintiff dishonourable or discreditable conduct or motives or lack of integrity on part of the plaintiff of being unethical and greedy mining company. The plaintiff has therefore succeeded in proving, on the balance of probabilities, all the three basic elements of defamation.
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> [17] I would further note that the evidence of the plaintiff's witnesses, particularly PW1, PW2 and PW3, showed that the concern of the residents of Bukit Koman to their health and safety as depicted in the said articles and videos turned out to be without merits and groundless. The use of sodium cyanide by the plaintiff for its carbon-in-leach plant did not at all caused any pollution as the plaintiff has exercised stringent safety and appropriate methods in mining gold. In fact it was in evidence that the various health issues suffered by most of the residents of Bukit Koman were due to traces of herbicides.

[108] However, the learned judge found that the defendants had successfully made out the defence of qualified privilege or more specifically the defence known as the *Reynolds* privilege as propounded by the House of Lords in *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127; [1999] 4 All ER 609. The learned judge noted that the *Reynolds* privilege has two prerequisites before the defendants can avail to it and they are firstly, that the publication concerned a matter of public interest; and secondly, that responsible and fair steps had been taken to gather, verify and publish the information.

[109] On whether the two requisites were satisfied in respect of the articles and videos in question, the learned judge observed:

> [23] On the issue of public interest, I believe the question that needs to be asked and answered is whether there was a need at the material time for the public in general to know about the information published in the said articles and videos and that the defendants as newspaper and journalist were under a public duty to tell the public. In my opinion any matter or issue that concern the health, well-being and safety of a community is always a matter of public concern, not just to that particular community but also to the general public. The defendants through their witnesses, particularly DW1, DW4 and DW10, have shown that prior to the publication of the said articles and videos, there was already extensive coverage by the other media on the issue of gold mining activities using cyanide and that the issue was also raised even in the Pahang Legislative Assembly. In 2006 onward, news began to emerge on a national scale that the residents of Bukit Koman started to raise protest on the use of cyanide in the plaintiff's gold mine. News articles began to be published in newspapers such as *Nanyang Siang Pau*, *The Star*, *Utusan Malaysia*, *Sin Chew Daily* and *China Press* surrounding the alleged use of cyanide in the plaintiff's carbon-in-leach plant in Bukit Koman. There was also legal proceedings by way of judicial review instituted by four members of the Bukit Koman residents in 2008 to challenge the environment impact assessment report pertaining to the mining and extraction of gold in Bukit Koman. The concern of the Bukit Koman's residents pertaining to the gold mining activity of the plaintiff has even led to the formation of the BCAC, a public interest group against the use of cyanide in gold mining. In the circumstances, I think there is clear evidence that issue pertaining to the concern of the Bukit Koman's residents about the operation of the gold mine in their town was clearly a matter of public interest.
>
> [24] The first article published in Malaysiakini website on 19 March 2012, as testified by DW2 (the second defendant), was sourced from the news appearing in websites on the internet, particularly Sin Chew Daily website and Nanyang Siang Pau website. DW7 and DW8 confirmed that the news items exh D15 and exh D16 respectively, were published on their respective newspaper's website. Exhibit D15 and D16 was about the concern of the villagers of Bukit Koman about air pollution caused by yellow substance floating in the air. DW2 also visited other blogs that spoke about the same subject matter. And finally, DW2 contacted and spoke to Wong Kin Hoong who was at the material time the Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the first article. Objection were taken by learned counsel for the plaintiff on the admissibility of exhs. D15 and D16. I see no merits in the objection taken by learned counsel. The two exhibits

have been confirmed and verified by the editors of the two newspapers, that is DW7 and DW8, and therefore the authenticity of the same cannot be doubted. A

[25] I am of the opinion that the first article merely reported the concern of the Bukit Koman's residents as to their health and the suspicion that the air pollution may be caused by the plaintiff's gold mining operation. Reading the first article as a whole, one will find that it made no allegations or criticism against the plaintiff. In other words, there is no embellishment of the contents of the first article by the first and second defendants. Much has been argued by learned counsel for the plaintiff that the first and second defendants have not verified the contents of the first article with the plaintiff or with other experts before publishing the same. However, in my opinion the act of the second defendant contacting the Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the first article was sufficient in the circumstances of this case to constitute responsible journalism. This is because the first article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman residents regarding the air pollution which they suspect was caused by the plaintiff's plant. The defendants therefore have satisfied the test of responsible journalism. B C D

[26] As for the second article with link to the first video and the third article with link to the second video, it cannot be denied that these were reproduction of the two press conferences held on 21 June 2012 and 2 August 2012. There is no evidence that the first defendant as publisher of those articles and videos, the third defendant as author of the second article, the fourth defendant as author of the third article and DW3 as the videographer for the first and second videos adopted the contents of those articles and videos as their own. As I have alluded to, the said articles and videos are matter of public concern where the public in general has the right to know the information and the defendants as media and journalists were under, at least a moral duty to publish the same. E F

[27] Further, it is my judgment that the defence of reportage is clearly available to the defendants with regard to the publication of the second and the third articles and the first and second videos. It is not so much the truth of the contents of the said articles and videos that matters, but rather the fact that they were reproduction of the two press conferences held by BCAC, first on 21 June 2012 and, second on 2 August 2012. Malaysiakini and other medias had received invitation to attend the two press conferences. The defence of reportage is therefore available to the defendants because the public interest here lies not in the truth of the contents of the said articles and videos, but on the facts that they had been made. The two press conferences held by BCAC themselves, in my view, are matter of public interest. I am aware of the general principle that a person who repeats the defamatory words of another will also be liable to the person defamed. However, it has been said that the *Reynolds* privilege of reportage appears to be the exception to the so-called general rule of repetition. G H

[28] The plaintiff's learned counsel submitted that the defendants have not specifically pleaded reportage in their defence and as such should not be allowed to rely on this particular defence. I merely wish to say that reportage is one form of the *Reynolds* privilege and it is considered part of the qualified privilege defence. The defendants have pleaded qualified privilege as one of their defences to the plaintiff's claim in paras. 33 and 35 of the defence. In my opinion that would be sufficient to I

enable the defendants to prove reportage at the trial of the action. I am also in agreement with learned counsel for the defendants that the case of *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191; [2011] 3 CLJ 861 relied upon by the plaintiff's learned counsel was decided based on the particular facts of that case.

[110] The learned judge also went on to hold that the articles and videos were published in a fair, disinterested and neutral way and that the defendants did not adopt the allegations contained therein as their own. There was also no evidence of malice on the part of the defendants. Since malice was not proved, the claim for malicious falsehood cannot succeed. In the event, the plaintiff's claim against all the defendants was dismissed.

AT THE COURT OF APPEAL

[111] The appeal in the Court of Appeal turned on issues relating to the defence of reportage and the defence of responsible journalism or qualified privilege. The court affirmed the dismissal of the claim for malicious falsehood but allowed the appeal against the dismissal on the claim for defamation and awarded the appellant the sum of RM200,000 in general damages.

[112] As reported in *Raub Australian Gold Mining Sdn Bhd v Mkini Dotcom Sdn Bhd & Ors* [2018] 4 MLJ 209, the reasons for allowing the appeal were as follows (at the headnotes):

(1) Although the trial judge was correct in finding that the information contained in the respondent's articles and videos was a matter of public concern or interest, the respondents had not acted fairly and responsibly and could not rely on the defence of responsible journalism as they failed to meet the relevant ten-point test propounded in *Reynolds*. With regard to the first article, except for seeking confirmation from the residents of Bukit Koman through the chairman of the BCAC, the verification stopped there. The respondents made no attempts or efforts to contact other experts on the matter or to contact the appellant to get its side of the story. Merely contacting the chairman of the BCAC was grossly inadequate. The article made very serious allegations against the appellant and its tone was extremely accusatory and damaging. Due to the seriousness of the allegations, responsible journalism warranted a fair and balanced reporting where the appellant should have been given an opportunity to answer the accusations (see paras 29 & 38–40).

(2) The trial judge erred in finding that the respondents could rely on the defence of reportage by just pleading the defence of qualified privilege. A defendant could not rely on reportage by just pleading the defence of responsible journalism. Although reportage emanated from the same product (responsible journalism), it had distinctive features of its own which set it apart from the defences of responsible journalism or qualified

privilege. If the respondents wanted to rely on the defence of reportage, they should have expressly pleaded that defence so that the appellant was not taken by surprise. By not pleading reportage, the respondents were precluded from relying on that defence or from proving reportage at trial. The defences of reportage and responsible journalism were in effect mutually exclusive and incompatible in that once reportage was relied upon, it was 'forensically problematical to fall back upon an alternative defence of responsible journalism' (per Sedley LJ in *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750). In the case of reportage, there was, inter alia, complete neutrality which inferred a state of mind and intent whereas in responsible journalism, a view might be justifiably proffered. The respondents should have decided which of the two they wanted to plead — reportage or responsible journalism. Pleading in the alternative did not work here (see paras 63 & 69).

(3) Even if a plea of qualified privilege or responsible journalism encompassed a plea of reportage without the need to expressly plead the latter, the evidence as a whole, considered objectively, showed that the respondents could not avail of the defence of reportage. The allegations made against the appellant were not reported in a fair, disinterested and neutral manner. The reporting was unbalanced and slanted against the appellant. The respondents had not only embellished the allegations against the appellant but had embraced and adopted them as the truth and as their own (see paras 70 & 74–76).

(4) Although the respondents' conduct displayed irresponsible journalism and partiality in their reporting which could not be justified under the cover of public interest, it was insufficient to constitute malice to sustain a cause of action for malicious falsehood. The appeal against the dismissal of the claim for malicious falsehood was therefore dismissed (see para 77).

(5) The appellant had not proven to what extent its business or trade was affected by the impugned articles and videos. On the other hand, the respondents' attitude throughout was unyielding, unrepentant and arrogant. They refused to retract or apologise for the libel. Considering all the facts and circumstances, the court was of the view that a global sum of RM200,000 was adequate as general damages to the appellant for loss of goodwill and vindication of its reputation (see paras 82, 85 & 92).

[113] Nevertheless, the Court of Appeal agreed with the High Court's finding that the subject matter of the articles and the videos was of public interest as they concerned the health, well-being and safety of a community. The appeal was allowed on the ground of a defect in the pleadings as well as the failure on the part of the defendants to establish the defence of reportage and the defence of responsible journalism or qualified privilege.

A ISSUES FOR DETERMINATION

[114] Following from the leave questions and the arguments raised by the parties, and at the risk of some oversimplification, the broad issues for our consideration and determination are as follows. The first issue is whether
B reportage is in law a separate defence from the *Reynolds* defence of responsible journalism and whether it is mandatory for the two defences to be pleaded separately. Allied to this issue is whether the two defences can be pleaded in the alternative.

C

[115] The second issue is whether the defendants had, as a matter of law and fact, made out a case of reportage and/or qualified privilege in the *Reynolds* sense in respect of the articles and videos as affirmatively determined by the High Court but overruled by the Court of Appeal.

D

[116] The third issue, which does not arise from the leave questions or from the decision of the Court of Appeal, is whether the claim for defamation in respect of the second article and the first video is actionable in view of the said publication being found not defamatory as eventually determined by this
E Court in *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720; [2019] 3 CLJ 729 ('Hue Shieh Lee').

Third issue: Whether the articles and videos are actionable

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[117] For convenience, the third issue ought to be dealt with at the outset. In *Hue Shih Lee's* case, the plaintiff here filed an action against Hue Shih Lee, who was the Vice Chairperson of the Pahang Ban Cyanide in Global Mining Action Committee ('BCAC') for libel and malicious falsehood in respect of two
G articles that appeared in malaysiakini.com ('the first article') and freemalaysiatoday.com ('the second article') websites. The first article there is the second article sued upon in the present appeal. The first article contained a link to a video of a press conference given by several individuals including Hue Shih Lee regarding the plaintiff. These articles were found to be not defamatory
H of the plaintiff by the High Court which decision was thereafter affirmed by the Court of Appeal and the Federal Court.

[118] Now, the defendants here, in relying on *Hue Shih Lee's* case, assert that in view of the findings of the Federal Court that the two articles were not
I defamatory of the plaintiff, this court is therefore bound by the said decision since the statements made by Hue Shih Lee are those produced in the second article and the first video in the present appeal.

[119] The defendants also argued that the determination by the Federal Court

that the article is not defamatory creates an estoppel *per rem judicatum* against the present plaintiff. Relying on *Thoday v Thoday* [1964] 1 All ER 341 as cited in *Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal* [2017] 1 MLJ 262, it was asserted that the claim's actionability ceases because it becomes merged in the judgment. It would be legally untenable, it was suggested, with the second article having been found to be not defamatory in the contextual sense by the Federal Court, to now hold that the first and third articles of the same genre are defamatory.

[120] Now, this court in *Hue Shih Lee* was confronted with the same issue where it was submitted by the plaintiff there that the Court of Appeal judgment in the present case holding that the Malaysiakini article was defamatory was binding on the Federal Court as a matter of estoppel since they involved the same articles. The court was not persuaded by this argument and, as that decision effectively provides the answer to this issue, it is necessary to set out *in extenso* as to how thiscourt dealt with the issue:

> [75] In the course of his submissions before us, learned counsel for the appellant raised issues on other defamation suits filed by the same appellant concerning the same articles (as in the present case) against other defendants namely the MKini and FMT. The respondent in the present case was not the party in those cases.
>
> [76] The *MKini* suit was decided by another High Court after the present case was decided by the Kuala Lumpur High Court on 13 May 2015. On appeal, the Court of Appeal allowed the appeal on the present case on 13 April 2016. In the MKini suit, both the High Court and the Court of Appeal ruled that the impugned articles (the very same articles in the present case) were defamatory of the appellant. Learned counsel for the appellant submitted before us that the decision of the High Court and the Court of Appeal in the MKini suit on the determination that the articles were defamatory is binding on the Federal Court in the present case before us; as a matter of estoppel, not judicial precedent.
>
> [77] In the FMT suit, there was no judicial pronouncement by the court that the words in the articles were defamatory. In that case, the defendant therein (MToday Sdn Bhd — FMT) as the publisher tendered an apology taking full responsibility for the articles.
>
> [78] It is noted that the respondent herein was not a party in both the MKini suit as well as the FMT suit; nor did she has a say in the apology agreed upon by the parties in the FMT suit. Each case must be dealt with and decided on its own merit after hearing all parties to the respective suits. The plaintiff in each case must be required to prove each and every one of his claims against each defendant individually, on all the relevant elements to establish defamation, ie defamatory effect of the statements, directed at the plaintiff, and publication to third party.
>
> [79] We cannot agree with learned counsel's submissions that this court is bound by the decision of the High Court in the MKini suit, especially bearing in mind that in the present case before us, both the High Court and the Court Appeal have made concurrent findings of facts entirely different from the High Court's MKini suit. Both the High Court and the Court of Appeal in the present case had ruled that

both the impugned Articles and the video were not defamatory and their decisions were delivered earlier in time. In short, it must be stressed that this court is not bound to accept, nor is the respondent estopped by the finding of the High Court in the MKini case that the impugned words are defamatory as suggested by the appellant's counsel.

[80] It must also be noted that defamation claims are 'sui generis', in that multiple suits are permitted against different defendants in relation to the same publication; and therefore, the defendant in the present case, cannot be estopped by a determination in any other suit to which he was not a party. The ruling made by the High Court in the MKini suit, where the respondent herein, was not a party thereto, will not bind the respondent herein, who in a different proceeding may secure a different result based on the facts and circumstances of her own defence. It would be a breach of natural justice rule and an abuse of the court's process for a plaintiff (the appellant) to be permitted to file multiple suits against different defendants in defamation actions, but to be relieved of the burden of proof merely because one suit is resolved in its favour. In dealing with the present appeal before us, we only need to examine the decisions of the Court of Appeal and the High Court in this case with respect to the facts and circumstances of its own.

[81] We agree with learned counsel for the respondent that the meanings ascribed to those words in the impugned articles in the MKini suit by the appellant and pleaded against MKini were different from those pleaded against the respondent in this case. As such, the courts in this case were required to look at the impugned words from an entirely different perspective as compared to the court in the *MKini* case.

[121] Now, to recall, the High Court in the present case had held that the articles and the videos in question were defamatory of the plaintiff. This finding appears in para [16] of the judgment:

[16] It is therefore my judgment that the words complained of as stated by the plaintiff in paras 8, 11, 17, 20 and 25 of the statement of claim are capable of being defamatory of the plaintiff in their natural and ordinary meaning. I agree with the plaintiff's learned counsel that the said articles and videos impute to the plaintiff dishonourable or discreditable conduct or motives or lack of integrity on part of the plaintiff of being unethical and greedy mining company. The plaintiff has therefore succeeded in proving, on the balance of probabilities, all the three basic elements of defamation.

[122] The defendants did not appeal in respect of this part of the decision. The Court of Appeal was only concerned with the defences raised by the defendants and not with the question of whether the articles and videos were defamatory. It must then follow, in my view, that the defendants had accepted the decision of the High Court in this respect and cannot now reassert the said issue in this court.

[123] As defamation claims are *sui generis*, it is up to the parties to take their own respective positions as to the conduct of the litigation even if the alleged

defamatory material is the same. It cannot be said that two different courts have arrived at two different conclusions on the same factual and legal issue as the defendants in the instant case had effectively abandoned the issue which they now wish to resurrect. Put simply, the court is now not required to decide on the issue as, because of the defendants' election, the issue is no longer before the court. The position that obtains accords with the adversarial tradition that underpins litigation in the common law world. In the circumstances, the argument by the defendants in this respect, as persuasive as it seems, cannot be sustained.

[124] It should however be clarified, lest it be misunderstood, that if the question of whether the impugned articles and videos were defamatory was a live issue, then the application of issue estoppel or estoppel *per rem judicatum* may be relevant against the plaintiff/respondent here. Since this court in *Hue Shih Lee* had ruled that the same articles were not defamatory of the respondent here, it would have been legally untenable for this court to now say otherwise.

First issue: The law on reportage and reynolds privilege

[125] Returning now to the first issue, it has long been recognised that on the grounds of public policy and convenience, the law protects even false and defamatory statements which are made on an occasion of privilege. The privilege is not absolute but qualified. So, where privilege is abused in the case of express or actual malice in the publication, the privilege fails (see *Horrocks v Lowe* [1975] AC 135). So, in essence, where privilege is availed, the law may actually leave a person defamed with his reputation in tatters and with no compensation. A person untrained in the law may find this proposition of protecting untrue and defamatory publications quite remarkable and discomforting. Tipping J in *Lange v Atkinson* [1998] 3 NZLR 424 at p 477 alluded to this curious state of affairs:

> It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media.

[126] Now, of course, the limiting factor in asserting privilege as a defence is really the 'occasions of privilege' which are determined mostly by case law. Lord Atkinson in *Adam v Ward* [1917] AC 309 provided the widely accepted formulation of determining an occasion of privilege as follows (at p 334):

A [A] privileged occasion is, in reference to qualified privileged, an occasion where the person who makes the communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made had a corresponding interest or duty to receive it. This reciprocity is essential.

B **[127]** This reciprocity test, as it came to be called, did not work so well in the case of mass publications such as those provided by the media. It was considered that qualified privileged ought to be confined to private communications as opposed to communications made to the whole world. Hence, the media were largely unsuccessful in persuading the courts that they C had a duty to publish and the public had a duty to receive such communications even on matters of legitimate public interest. The notable exception is the case of publication of fair and accurate reports of parliamentary and judicial proceedings.

D **[128]** A seismic shift in judicial thinking then occurred at about the same time through landmark decisions in Australia (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), New Zealand (*Lange v Atkinson* [1998] 3 NZLR 424) and the United Kingdom (*Reynolds v Times Newspapers Ltd and* E *others* [2001] 2 AC 127; [1999] 4 All ER 609 ('Reynolds')) although there was some divergence in the approach to the defence of qualified privilege for mass communications. The differences in approach of the three cases was discussed in *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 3 AMR 514 ('Anwar v NST').

F **[129]** These differences are not entirely relevant in the present context except to observe, as noted in *Anwar v NST*, that the widest scope of protection for the media is probably that in *Reynolds* since the protection was for 'matters of serious public concern'. In *Jameel and another v Wall Street Journal Europe* G *SPRL* [2006] 4 All ER 1279; [2006] UKHL 44; [2007] 1 AC 359 ('Jameel'), Baroness Hale of the House of Lords described the *Reynolds* defence as one that 'springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information'. She concluded: H 'In truth, it is a defence of publication in the public interest' (at p 685).

[130] Underpinning this shift in thinking was the appreciation that members of the community in a modern plural democracy have a legitimate interest in receiving information concerning matters of public interest or serious public I concern. Such matters would include the conduct of government and the exercise of public functions as well as matters relevant to the safety, health and well-being of ordinary citizens. The welfare of the community is best served by protecting the free flow of information, ideas and vigorous discussion initiated by the media and others of matters of public interest.

[131] Not unlike Australia, New Zealand and the United Kingdom, Malaysia is also a modern pluralistic democracy with fundamental human rights guaranteed under the Federal Constitution. Freedom of speech is provided under art 10 of the Federal Constitution with restrictions to be provided by laws against matters such as defamation. So, for the same reasons as advanced in the three jurisdictions, and taken together with the constitutional imperative for protection of freedom of expression, matters of public interest are also deserving of protection in Malaysia.

[132] To this end, the courts in Malaysia have followed and accepted the *Reynolds* defence. In the present case, the courts below applied the *Reynolds* approach in coming to their decisions. Significantly, this court in *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187 ('Tony Pua'), in applying the *Reynolds* privilege, went on to also hold that the public interest defence should, by no means, be synonymous with journalists or media publications and on the ground of public interest, there was a sufficient basis for the defence to be extended to anyone who publishes or discloses material of public interest in any medium to assist the public to comprehend and make an informed decision on matters of public interest that affect their lives.

[133] It is therefore important to address the *Reynolds* defence and the cases that further developed the nature and scope of the defence, that is, the decision in *Jameel*, and the decision in *Flood v Times Newspapers Ltd* [2012] 2 WLR 760; [2012] UKSC 11; [2012] 2 AC 273; [2012] 4 All ER 913 ('Flood'). It must be observed at the outset that the *Reynolds* defence is not so much about 'occasions of privilege' in the traditional sense but rather of the published material itself being privileged. As will become apparent in the following discussion, the issue of malice in the traditional sense does not arise as it is built into the multi-factorial test devised in *Reynolds* (see *Jameel* at [46]).

[134] In *Reynolds*, a two-stage test was formulated by for determining whether the *Reynolds* defence applied. The first stage involved determining whether the subject matter of the publication was a matter of public interest. The second stage was concerned with whether the steps taken to gather and publish the information were responsible and fair.

[135] So what is a matter of public interest? It is admittedly a broad concept but for the defence to bite, it must refer to matters involving public life and the community, including important matters relating to the government and the public administration, as opposed to matters which are purely personal and private (see *Reynolds*, Court of Appeal, [2001] 2 AC 127 at p 176).

[136] Gatley on *Libel and Slander* (12th Ed) at para 15.6 highlighted previous decisions where the concept of public interest was approved as follows:

A These have included the business of government and political conduct; the promotion of animal welfare, the protection of health and safety, the dealings of a Member of Parliament with a foreign regime hostile to this country, the fair and proper administration of justice, the conduct of religious groups; discipline in schools; the conduct of the police; cheating, corruption and the pressure on elite B athletes from an early age in sport; breach of charitable fiduciary rules; involvement in serious crimes, corporate malpractice; and the correction of prior statements or misrepresentations by others.

C **[137]** In order to determine if the publication was in the public interest, it is necessary to consider the story as a whole as well as giving due allowance for editorial judgment as to how the story is to be presented. Lord Hoffman said as much in *Jameel*, at para [51]–[52]:

D 51. If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. But whereas the question of whether the story as a whole was a matter of public interest must be decided by E the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general F message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting.

G **[138]** In similar vein, Lord Mance in *Flood*, concluded tersely at para [137]:

137. The courts therefore give weight to the judgment of journalists and editors not merely as to the nature and degree of the steps to be taken before publishing material, but also as to the content of the material to be published in the public interest. The courts must have the last word in setting the boundaries of what can H properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect. This is, in my view, of importance in the present case.

I **[139]** The second stage shifts to the question of whether the steps taken to gather and publish the information were fair and reasonable. Lord Nicholls in *Reynolds* sets out a list of ten non-exhaustive circumstances to determine if the publisher has exercised responsible journalism although, as pointed out earlier, the defence is not confined to the press. The ten factors are:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true;
2. The nature of the information, and the extent to which the subject matter is a matter of public concern;
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories;
4. The steps taken to verify the information;
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect;
6. The urgency of the matter. News is often a perishable commodity
7. Whether comment was sought from the plaintiff. The plaintiff may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary;
8. Whether the article contained the gist of the plaintiff's side of the story;
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact;
10. The circumstances of the publication, including the timing.

[140] As Lord Nicholls explained later in *Bonnick v Morris and others* [2003] 1 AC 300, these factors were necessary to provide the right balance between freedom of expression and reputation (at p 309):

> Shortly stated, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.

[141] So, how should the ten factors be assessed by the courts? As Lord Nicholls said in *Reynolds*, the list is not exhaustive but merely illustrative. A balancing operation must be carried out and the weight to be given to any of the factors will vary from case to case. They are certainly not ten hurdles or tests to be negotiated in the sense that if any one of them is not met, the defence fails. As Lord Hoffman said in *Jameel*, the indicia of 'responsible journalism' were not mandatory obstacles to be overcome. The standard of conduct required of a newspaper must be applied in a practical and flexible manner having regard to practical realities (see *Jameel* at [56]).

[142] In the same context as well, Lord Nicholls in *Reynolds* was at pains to reiterate (at p 205):

> Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

[143] Now, another aspect of the defence of publication in the public interest, which is relevant to the instant appeal, is the defence of reportage. Reportage, despite its fancy label, is really shorthand for neutral reporting of attributed allegations. It is reminiscent of privilege accorded to fair and accurate reports of parliamentary and court proceedings. This defence was first explored and applied in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EWCA Civ 1634.

[144] This defence was also raised in *Anwar v NST*, where the defence was summarised as follows:

> [74] As I had indicated earlier, the law allows reporting privileges through fair and accurate reports of parliamentary and court proceedings. The defendants here are relying on a more general privilege known as reportage. According to *Gatley on Libel and Slander* (11th Ed) this doctrine first surfaced in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2001] EMLR 13. Reportage in that case was depicted as 'a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper'. Since then reportage has been considered in a number of cases; *Mark v Associated Newspapers Ltd* [2002] EMLR 839; *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17; *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] 3 WLR 642; *Roberts and another v Gable and others* [2008] 2 WLR 129 and *Charman v Orion Publishing Group Ltd* [2008] 1 All ER 750.
>
> [75] In *Roberts v Gale*, Ward LJ described reportage as 'the neutral reporting without adoption or embellishment or subscribing to any belief in its truth of attributed allegations of both sides of a political and possibly some other [2010] 2 MLJ 492 at 520 kind of dispute'. Significantly, Ward LJ also alluded to the relationship of the repetition rule with reportage cases. The repetition rule as set out by Lord Reid in *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1964] AC 234 at p 260 was that 'repeating someone else's libelous statement is just as bad as making the statement directly'. And that is what happens in reportage cases. However, Ward LJ held that the repetition rule and the reportage defence are not in conflict with each other. The former is concerned with justification, the latter with privilege. A true case of reportage may give the journalist a complete defence of qualified privilege. If the journalist does not establish the defence then the repetition rule applies and the journalist will have to prove the truth of the defamatory words

(see *Roberts & Anor v Gable & Ors* at p 153).

[76] From a consideration of the cases cited, it can be safely asserted that reportage would normally apply as follows. It would only apply in cases where there is an ongoing dispute where allegations of both sides are being reported. The report, taken as a whole, must have the effect that the defamatory material is attributed to the parties in the dispute. The report must not be seen as being put forward to establish the truth of any of the defamatory assertions. This means that the allegations must be reported in a fair, disinterested and neutral way. The important consideration here is that the allegations are attributed and not adopted. Therefore reportage will not apply where the journalist had embraced, garnished and embellished the allegations.

[145] Since then, reportage came to be considered in *Flood*, where Lord Phillips PSC restated the defence of reportage in succinct terms:

... Reportage is a special, and relatively rare, form of *Reynolds* privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. It protects the publisher if he has taken proper steps to verify the making of the allegation and provided that he does not adopt it. *Jameel's* case was analogous to reportage because it was the fact that there were names of substantial Saudi Arabian companies on the black list that was of public interest, rather than the possibility that there might be good reason for the particular names to be listed. Just as in the case of reportage, the publishers did not need to verify the aspect of the publication that was defamatory.

[146] So, to surmise, the distinction between the two lies in whether the public interest is concerned with the fact that the statement is made and not the truth of its contents. This distinction was made clear by Lord Hoffman in *Jameel* as follows (at [62]):

In most cases the *Reynolds* defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true, but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth.

[147] To complete the narrative on the law, it is also necessary to state that the law in the United Kingdom has undergone further change. The defence of publication on a matter of public interest is now a statutory defence enacted in s 4 of the UK Defamation Act 2013. It replaces the common law defence of *Reynolds* public interest privilege. It may therefore be helpful to set out the whole section:

4 Publication on matter of public interest

(1) It is a defence to an action for defamation for the defendant to show that —

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

A (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

B (3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

C (4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a D statement of opinion.

(6) The common law defence known as the *Reynolds* defence is abolished.

[148] The Explanatory Notes to the UK Defamation Act 2013 suggest that E this new s 4 is based on the *Reynolds* case and the law which developed in subsequent cases, in particular, the case of *Flood*. The intention was to reflect the fact that the common law test contained both a subjective element — what the defendant believed at the time — and an objective element — whether the belief was a reasonable one for the defendant to hold in all the circumstances.

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[149] After the statutory defence came into effect on 1 January 2014, an important issue arose as to the effect of the role of responsible journalism which was the main focus in the *Reynolds* case. This issue came to be considered in a recent case, *Serafin v Malkiewicz and others* [2020] 4 All ER 711; [2020] G UKSC 23 ('Serafin'), where the UK Supreme Court observed that although the origins of the se 4 defence can be traced back to *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127; [1999] 4 All ER 609, s 4 does not simply codify the old *Reynolds* defence. In particular, the checklist of factors set out in *Reynolds* should not be used as a 'checklist' in applying s 4 of the Defamation H Act 2013. However, that is not to say that one or more of them may well be relevant as to whether the defendant's belief was reasonable within the meaning of s 4(1)(b) of the Act.

[150] It may then be fair to say that the law in the United Kingdom has taken I a significant swing in focus in that the *Reynolds* defence of responsible journalism has now shifted to a concept of reasonable belief that the publication is in the public interest. The focus is now on what the defendant publisher believed at the time rather than what a judge believes some weeks or months later (see *Serafin*, at para [62]) with the advantage of leisure and

hindsight (see para [40] above). This new shift in focus avoids the inflexible and rather strict way in which the courts have regarded the *Reynolds* test as some kind of checklist or hurdles for the defendants to overcome which to a great extent discouraged investigative reporting. Interpreted in this fashion, it is more than likely that this statutory defence of public interest would be a less vigorous test for the media and, in the end, a more attractive and appealing proposition all round. It is also significant that the defence of reportage of an 'accurate and impartial account of a dispute' has now been statutorily confirmed. Notably, Australia has followed a similar path by recently amending its Defamation Act 2005 to include a new public interest defence in s 29A which was modelled on s 4 of the UK Defamation Act 2013 but with some differences.

[151] It is, of course, significant for us that the *Reynolds* defence is no longer followed in the country of its origin. The two-stage test in the *Reynolds* defence has been replaced by a different three requirements test as set out in s 4 of the UK Defamation Act 2013. In this new test, the defendant will have to firstly establish that the statement was on a matter of public interest, secondly, that the defendant believed that publication of it was in the public interest and thirdly, that such belief was reasonable (see *Serafin*, at para [74]). Considering the facts and the evidence as adduced in the present case, and as will become apparent from the discussion that follows, it is interesting to observe that the defendants here would have had no difficulty in establishing the three requirements under s 4 of the UK Defamation Act 2013.

[152] Be that as it may, none of the parties in the instant case had suggested that we follow along the same path. Indeed, they could not do so without formally inviting the court and without putting forward full arguments as to the direction in which our law should take with regard to the public interest defence. Until that transpires in a future case, and given that the law of defamation in this regard in the United Kingdom is likely to journey along a slightly different path, we in Malaysia may have to persevere with the *Reynolds* defence. As noted earlier, our position can always be reviewed in a later suitable case with the assistance of full arguments and with fair notice to the parties as well as having the benefit of the efficacy of defamation laws in other common law jurisdictions.

[153] Having dealt with the law, it may be convenient at this juncture, to now come to the first issue raised in the appeal which is whether reportage is in law a separate defence from the *Reynolds* defence of responsible journalism and whether it is mandatory for the two defences to be pleaded separately.

Allied to this issue is whether the two defences can be pleaded in the alternative.

[154] Now, the High Court considered that reportage was a form of *Reynolds*

privilege and that there were two situations in which the *Reynolds* privilege applies. The first is responsible journalism where the public interest in the allegation that is reported lies in its contents. The second is reportage where the public interest lies in the making of the allegation itself and not the contents of the allegation. On the issue of whether the defendants have specifically pleaded reportage, the High Court considered that pleading qualified privilege in paras 33 and 35 of the defence was sufficient to enable the defendants to prove reportage at the trial.

[155] The Court of Appeal, on the other hand, took the position that reportage must be treated separately from responsible journalism. In other words, it was a separate and distinct offence such that it must be specifically pleaded. Relying on numerous cases including the case of *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191, the court held that failure to so plead precluded the defendants from relying on this defence as it will be prejudicial to the plaintiff.

[156] On this question, I would say at once, and with respect, that the Court of Appeal was wrong both on the issue of substantive law and on the requirements of pleading as was set out earlier. In my respectful view, reportage is not a distinct and separate offence from responsible journalism or qualified privilege generally. It is part of the *Reynolds* family of public interest privilege or responsible journalism. It is not a defence *sui generis* as underpinning both defences is the public policy of the duty to impart and receive information as reflected in the leading cases on reportage such as *Jameel, Flood* and *Roberts and another v Gable and others* [2008] 2 WLR 129 ('Roberts')

[157] This was essentially the thrust of Ward LJ's observation in *Roberts*, at [60]:

> Once reportage is seen as a defence of qualified privilege, its place in the legal landscape is clear. It is, as was conceded in the *Al-Fagih* case [2002] EMLR 215 a form of, or a special example of, *Reynolds* qualified privilege, a special kind of responsible journalism but with distinctive features of its own. It cannot be a defence *sui generis* because the *Reynolds case* [2001] 2 AC 127 is clear authority that whilst the categories of privilege are not closed, the underlying rationale justifying the defence is the public policy demand for there to be a duty to impart the information and an interest in receiving it: see p 194 G. If the case for a generic qualified privilege for political speech had to be rejected, so too the case for a generic qualified privilege for reportage must be dismissed.

[158] Ward LJ went on to suggest a useful approach in considering the defence of reportage at para [61]:

> Thus it seems to me that the following matters must be taken into account when considering whether there is a defence on the ground of reportage.

(1) The information must be in the public interest. A

(2) Since the public cannot have an interest in receiving misinformation which is destructive of the democratic society (see Lord Hobhouse of Woodborough in the *Reynolds* case, at p 238), the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published: see, also in the *Reynolds* case, Lord Nicholls's factor 4, at p 205 B, and Lord Cooke, at p 225, B and in the *Jameel case* [2007] 1 AC 359, Lord Bingham of Cornhill, at para 12 and Baroness Hale, at para 149. This is where reportage parts company with the *Reynolds case* [2001] 2 AC 127. In a true case of reportage there is no need to take steps to ensure the accuracy of the published information.

(3) The question which perplexed me is why that important factor can be C disregarded. The answer lies in what I see as the defining characteristic of reportage. I draw it from the highlighted passages in the judgment of Latham LJ in the *Al-Fagih case* [2002] EMLR 215, paras 65, 67–68 and the speech of Lord Hoffmann in the *Jameel case* [2007] 1 AC 359, para 62 cited in paras 39 and 43 above. To qualify as reportage the report, judging the thrust of it as a whole, must D have the effect of reporting, not the truth of the statements, but the fact that they were made. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 969. If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. E He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth.

(4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material F to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.

(5) This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once G that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report.

(6) To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed from the *Reynolds* case [2001] 2 AC 127, the burden being on the defendants. In this way the H balance between article 10 and article 8 can be maintained. All the circumstances of the case and the ten factors listed by Lord Nicholls adjusted as may be necessary for the special nature of reportage must be considered in order to reach the necessary conclusion that this was the product of responsible journalism.

(7) The seriousness of the allegation (Lord Nicholls's factor 1) is obviously relevant I for the harm it does to reputation if the charges are untrue. Ordinarily it makes verification all the more important. I am not sure Latham LJ meant to convey any more than that in para 68 of his judgment in the *Al-Fagih* case [2002] EMLR 215 cited in para 39 above. There is, however, no reason in principle why reportage must be confined to scandal-mongering as Mr Tomlinson submits. Here equally serious

allegations were being levelled at both sides of this dispute. In line with factor 2, the criminality of the actions bears upon the public interest which is the critical question: does the public have the right to know the fact that these allegations were being made one against the other? As Lord Hoffmann said in the *Jameel case* [2007] 1 AC 359, para 51:

> The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.

All the circumstances of the case are brought into play to find the answer but if it is affirmative, then reportage must be allowed to protect the journalist who, not having adopted the allegation, takes no steps to verify his story.

(8) The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as preconditions for reportage on the defendant being a responsible prominent person or the claimant being a public figure as may be required in the USA.

(9) The urgency is relevant, see factor 5, in the sense that fine editorial judgments taken as the presses are about to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time. That is not to say, as Mr Tomlinson would have us ordain, that reportage can only flourish where the story unfolds day by day as in the *Al-Fagih* case. Public interest is circumscribed as much by events as by time and every story must be judged on its merits at the moment of publication.

[159] A similar view was expressed in *Flood,* where Lord Mance agreed that the defence of public interest privilege involved a 'spectrum' which he described as follows at para [158]:

> I agree in this connection with what I understand to be Lord Phillips PSC's view that the defence of public interest privilege involves a spectrum. At one end is pure reportage, where the mere fact of a statement is itself of, and is reported as being of, public interest. Higher up is a case like the present, where a greater or lesser degree of suspicion is reported and the press cannot disclaim all responsibility for checking their sources as far as practicable, but, provided the report is of real and unmistakably public interest and is fairly presented, need not be in a position to produce primary evidence of the information given by such sources.

[160] In this context, the Court of Appeal may have unfortunately misapprehended the obiter remark by Sedley LJ in *Charman v Orion Publishing Group Ltd and others* [2008] 1 All ER 750; [2007] EWCA Civ 972 ('Charman') where it was observed that once a defendant had relied on the defence of reportage, it makes it forensically problematical to fall upon an alternative defence of responsible journalism and due to this difficulty, pleaders may need to decide which it is to be: reportage or responsible journalism. That observation, it must be said, was made in the context of 'a bald retailing of libels' which could not be regarded as reportage.

[161] In the circumstances, the adoption of the obiter remark by the Court of Appeal was, with respect, regrettable as the court failed to note that in *Charman*, the approach taken by all the judges was to deal first with the defence of reportage before considering qualified privilege per se. Having done so, their Lordships rejected the defence of reportage but upheld the defence of *Reynolds* privilege on account of the publication being a piece of responsible journalism.

[162] There was therefore no ruling, as the Court of Appeal appears to have accepted, that both species of the defence cannot be run as alternative defences. In fact, the case of *Charman* has been acknowledged as authority for the proposition that where a defendant fails to maintain a neutral stance and therefore loses the privilege of reportage, he/she may still be able to avail of the *Reynolds* public interest defence more generally by proving responsible journalism (see *Clerk & Lindsell on Torts* (21st Ed) para 22–154).

[163] In the instant case, it is noted that in paras 33 and 35 of the statement of defence, the defendants had pleaded qualified privilege by making specific references to 'responsible journalism' and of the matter being of 'public interest' with the defendants having a 'duty to publish' the ongoing story. The elements of 'public interest' and 'duty to impart' are affirmed by Ward LJ's underlying rationale in *Roberts* that the defence of reportage is justified by 'the public policy demand for there to be a duty to impart the information and an interest in receiving it'. Any plaintiff, properly advised by its legal advisors, could not have been left in any doubt that the *Reynolds* defence of reportage was also being pleaded especially when the terms 'public interest privilege' or 'responsible journalism' are used (see also *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133 at para [37]).

[164] It has never been the law of pleadings that the actual legal term be used if the facts and circumstances warranting the defence are set out (see *Re Vandervell's Trusts (No 2)* [1974] Ch 269). In other words, it is only necessary to plead the material facts and not the legal result. The legal consequences permitted by the material facts can be presented in argument. The principle of pleadings, it should be recalled, is to put the opposing party on notice as to one's case so as to promote fair and efficient litigation. If there is any doubt, parties are at liberty to seek further and better particulars.

[165] I do not think, in the circumstances, that it is open to the plaintiff to claim surprise or prejudice on this pleading issue. In my considered view, the High Court was quite right when it held that reportage had been sufficiently pleaded. The High Court was also right to distinguish the case of *Harry Isaacs*, as reportage there was never pleaded and argued in the trial court but only sought to be raised at the appellate stage.

Second issue: Whether the defendants had, as a matter of law and fact, made out a case of reportage and/or the Reynolds privilege

[166] The final issue is whether the defendants had, as a matter of law and fact, made out a case of reportage and/or qualified privilege in the *Reynolds* sense in respect of the articles and videos as affirmatively determined by the High Court but overruled by the Court of Appeal.

[167] In this respect, both the courts below were in agreement, with regard to the first element in proving the *Reynolds* defence — that the publications in question were on a matter of grave public concern and public interest. I do not think there can be any doubt about this as the Court of Appeal had provided cogent reasons as to why the publications were in the public interest as set out below:

> [29] Having perused para 23 of the learned trial judge's judgment as set out above, we find no error in the trial judge's reasoning that any matter or issue that concern the health, well-being and safety of a community is always a matter of public concern, not just to that particular community but also to the general public. As stated by the trial judge in her judgment, there was a need at the material time for the public in general to know and the defendants as a newspaper and as journalists were under a public duty to inform the public. This is so, as extensive coverage was given by the media (*Nanyang Siang Pau, The Star, Utusan Malaysia, Sin Chew Daily* and *China Press*) on the gold mining activities using cyanide resulting in the formation of BCAC, a public interest group against the use of cyanide in gold mining. Further, the legal proceedings by way of judicial review, instituted by four members of the Bukit Koman residents in 2008 to challenge the environment impact assessment report pertaining to the mining and extraction of gold in Bukit Koman culminating in these issues being raised in the Pahang Legislative Assembly kept the issue current, urgent and alive in the public domain. As such, in these circumstances, the learned trial judge was correct in finding that the information contained in the respondent's articles and videos are matters of public concern or interest.

[168] Having determined that the impugned articles and videos concerned a matter of public interest, the next stage would be to determine if the publications were the upshot of responsible journalism and were therefore protected under the defence of reportage or the general *Reynolds* privilege. It may be convenient to take the articles and videos together. To recap, there were three articles and two videos which were the subject matter of the defamation action. The first video was linked to the second article and the second video was linked to the third article. The articles and the videos were published on the first defendant's website www.malaysiakini.com.

[169] As noted earlier, the first article was titled 'Villagers fear for their health over cyanide pollution' and published on 19 March 2012. The second article

was titled '78 pct Bukit Koman folk have 'cyanide-related' ailments' and published on 21 June 2012. The third article was titled 'Raub folk to rally against 'poisonous' gold mine' and published on 2 August 2012. It was common ground, as noted by the courts below, that prior to the publication of these articles and videos in 2012, there was already extensive coverage by other news media such as *Nanyang Siang Pau*, *The Star*, *Utusan Malaysia*, *Sin Chew Daily* and *China Press* on the issue of the gold mining activities of the plaintiff using cyanide. The issue was also raised in the Pahang Legislative Assembly.

[170] In fact, from 2006 onwards, further news emerged of the protests on a national scale by the Bukit Koman residents against the use of cyanide. There were also legal proceedings by way of a judicial review up to 2012 to challenge the Environment Impact Assessment Report pertaining to the mining of gold in Bukit Koman. A public interest group, Ban Cyanide Action Committee ('BCAC'), was also formed by the Bukit Koman residents to advocate against the use of cyanide by the plaintiff in their mining activities.

[171] Coming now to the first article, the findings of the learned High Court judge were reproduced at para [12] earlier and can be summarised as follows:

(a) prior to the publication of the articles and videos, there was already extensive media coverage of the gold mining activities and the threat to the health of the Bukit Koman community and that these were matters of public interest;

(b) the first article was sourced from the news which had appeared in the *Sin Chew Daily* and *Nanyang Siang Pau* web sites as confirmed by the editors of these two websites at the trial;

(c) the first article was also sourced from blogs which carried the same news;

(d) the first article merely reported the concern of the Bukit Koman residents as to fears f or their health and the suspicion that air pollution is caused by the plaintiff's mining operation. It made no allegation or criticism against the plaintiff. There was no embellishment of the contents of article 1 by the first and second defendants; and

(e) verification of such news that was sought from Wong Kin Hoong, the then Chairman of the Bukit Koman Anti-Cyanide Committee prior to the publication of the first article was sufficient to constitute responsible journalism. This is because the first article is not about the truth or otherwise of the contents therein but a report on the concern of the Bukit Koman residents regarding the air pollution suspected to have been caused by the gold mining activities.

[172] Now, the Court of Appeal in respect of the first article came to a different conclusion, the reasons for which were set out earlier (see para [15]). In summary, the court took the view that there was no consideration of Lord Nicholls' ten points in *Reynolds*. Although there was some verification before publication, the court held that the verification sought with Wong Kin Hoong was insufficient. The court felt that as no attempts were made by the defendants to try and contact other experts on the matter or to get a response from the plaintiff, the defendants had failed to act fairly and responsibly.

[173] The court also held that the tone of the first article was extremely accusatory and damaging to the plaintiff. As the information was not verified, the defendants 'cannot rely on the defence of responsible journalism since the respondents (defendants) had failed to meet the relevant ten points test as propounded in *Reynolds*' (see para [40] of Court of Appeal judgment).

[174] In respect of articles 2 and 3 and the two videos that accompanied them, the High Court had found that the Articles were a reproduction of two press conferences held on 21 June 2012 and 2 August 2012. The learned High Court judge accepted that the defence of reportage was available in respect of both articles and videos as the public interest rested not in the truth of the contents but on the fact that that they had been made.

[175] The Court of Appeal, on the other hand, apart from the pleading point as discussed earlier, held that the defendants had failed to show that in the ongoing dispute, they had reported the allegations in a fair, disinterested and neutral manner without embracing, garnishing and embellishing the allegations. The court also observed that since the allegations were extremely serious and damaging, attempts ought to have been made to contact independent bodies such as the Department of Environment, the Department of Minerals and Geoscience or the Ministry of Health prior to publication. The court also noted that the defendants should have contacted the plaintiff to get its side of the story so as to maintain balanced reporting. The court went on to hold that the defendants were not entitled to avail themselves to the defence of reportage.

ANALYSIS AND DECISION

[176] After careful consideration of the judgments of the courts below and the arguments of the parties, it is my respectful view that the decision of the Court of Appeal cannot be sustained for a number of reasons. For convenience, I will attempt to discuss the reasons under broad points and then relate them to the impugned publications.

The Reynolds ten points

[177] I think the case law as I had set out earlier is without controversy. The cases are replete with warnings that the ten points should not be treated as compulsory requirements that will have to be met before a successful plea of responsible journalism can be accepted. As mentioned earlier, they are not 'hurdles to be cleared' (per Lord Bingham in *Jameel*) but must be applied in a practical and flexible manner having regard to practical realities (per Lord Nicholls in *Bonnick v Morris*). In *Tony Pua*'s case, in speaking for this court, Azahar Mohamed FCJ (now CJ Malaya) reiterated that the ten points were explanatory only and served as guidelines with the weight to be given varying from case to case.

[178] It was therefore unfortunate for the Court of Appeal to come to a finding at para [40] of the judgment that 'the respondents cannot rely on the defence of responsible journalism since the respondents had failed to meet the relevant ten points test as propounded in *Reynolds*'. This was further compounded when the court had earlier at para [37] accepted the plaintiff's criticism of the High Court judgment that 'there was absolutely no consideration of Lord Nicholls' ten tests ...'.

[179] A perusal of the High Court judgment, however, shows that the learned judge was very much alive to the ten points and had considered it to be the critical issue. The learned judge however considered, quite correctly, that the ten points were merely illustrative and a general guideline. So, it was erroneous for the Court of Appeal to accept the plaintiff's arguments in this respect.

[180] In the end, and as alluded to earlier, the learned judge considered that the first article was merely reporting the concerns of the Bukit Koman residents and their suspicion that the air pollution was caused by the plaintiff's gold mining activities. The court also observed, as noted earlier, that the first article was not about the truth of the contents but only the concerns of the residents there. The learned judge concluded that the defendants had satisfied the test of responsible journalism.

[181] Interestingly, although no arguments were put forward on this, given all the circumstances, a clear argument on the defence of reportage could also have been made out in respect of the first article. It seemed to me, as the learned judge found, that the first article was only about the concerns of the residents and not whether their suspicions were true. Reading the article as a whole, there certainly appeared to be no adoption or embellishment by the defendants.

[182] As apparent from the case law discussed earlier, a defendant publisher could attempt to plead and prove both reportage and the general *Reynolds*

privilege. They are both 'publications in the public interest' defences. However, in view of the nature of the defences, in the sense that they are part of a spectrum of the same defence, it is more convenient to establish reportage first although it is sometimes possible for a careful publisher to be able to establish both. Of course, if he establishes reportage, that would be the end of the matter.

[183] In the present case, the litigants have chosen to focus, as did the learned judge, on the *Reynolds* privilege alone. Nevertheless, given that there was no adoption or embellishment by the defendants of the allegations in question, the finding of the High Court judge of responsible journalism, as opposed to that of the Court of Appeal, is unassailable. The Court of Appeal was therefore, with respect, wrong to interfere with the finding of the High Court with respect to the first article.

Verification

[184] Now, the Court of Appeal was most concerned with the lack of verification of the allegations. The failure to verify was at the heart of the Court of Appeal's refusal to accord the defendants the protection of *Reynolds* privilege as well as to some extent the defence of reportage. There were two aspects to this. The first was the criticism by the Court of Appeal that no opportunity was given to the plaintiff to respond. The second is that verification of the allegations should have been sought from independent experts.

[185] With respect to the first aspect, there was a finding of fact by the High Court that as far as the third article was concerned, the first defendant did try to get a response from the plaintiff's representative prior to the publication but he declined comment. Further, by its solicitor's letter of 30 July 2012, the first defendant had offered the plaintiff a right of reply which it undertook to publish but the plaintiff did not respond and avail itself of the opportunity (see para [29] of High Court judgment).

[186] It appeared that the plaintiff had taken the position that it would not comment on any of the stories in view of the judicial review application. It is apposite to observe that had the plaintiff given their version of the events, the defendants would have been obliged to publish the same. Even though seeking the claimant's version is not a requirement in all cases, failure to publish the same if offered would count heavily against them and would almost certainly be considered as irresponsible journalism.

[187] Now, the Court of Appeal had not adverted to any of these facts which were found by the High Court. So, in my respectful view, it was plain that the court's decision in this context is unsustainable as it arises from a misreading of the facts of the case and against a specific finding of fact by the trial court. In

Jameel, it was held that a publisher would be acting reasonably when he had sought a comment but was ignored and thereafter proceeded to publish its story. It was also held in similar vein in *Charman*, at [91] that a unilateral libel reported disinterestedly will be equally protected. The reportage doctrine is not confined to the reporting of reciprocal allegations.

[188] The next aspect was on the insistence by the Court of Appeal on independent verification by experts. This was no doubt prompted by the plaintiff's approach in dealing with the verification issue as if it was a requirement of establishing the truth of the complaints. The plaintiff maintained that the defendant was obliged to independently seek a scientific determination of the truth of pollution and health hazards from experts such as the Ministries of Health or Environment or the Geology Department. The Court of Appeal upheld this plea and held that this was detrimental to the defendants' case as no attempt was made to contact such experts.

[189] With respect, this aspect of the Court of Appeal's decision, as a matter of law, is unsustainable in two respects. First, in cases of reportage, as long as there is no adoption and the defendant has engaged in neutral reporting, there is no requirement of verifying the truth of the allegations of an ongoing dispute (see *Roberts*, at [53]; *Flood*, at [77]). As observed earlier, unlike the general *Reynolds* defence, reportage is not about the truth of the statement but only that the statement was made. The classic case of reportage is that of a publication of two conceivably defamatory accounts by opposing parties locked in a dispute. In such cases, no verification of the truth of the allegations is required. Only an accurate and a balanced report of the allegations is necessary (see *Prince Radu of Hohenzollern v Houston and another* [2007] EWHC 2735 (QB) at [17]).The only qualification is that the *Reynolds* ten points have to be applied with the necessary adjustments in view of the special nature of reportage.

[190] In the present case, the defendants had, in any case, sought verification of the concerns of the residents from Wong Kin Hoong, who was the Chairmen of the Bukit Koman Anti-Cyanide Committee, who confirmed the fears of the residents. The defendants had also sought comments from the plaintiff on several occasions which were not forthcoming. However, in the second article, there was a reference to the comment by a Federal Minister and local Parliamentarian YB Ng Yen Yen that the gold mine was safe. There was a further reference to the State Local Government, Environment and Health Committee Chairperson Mr Hoh Khai Mun who told the State Assembly that the water was cyanide-free while the toxic chemical's presence in the air is within limits. Considered as a whole, the only fair and reasonable conclusion is that the impugned Articles and Videos were an accurate, balanced and neutral account of the dispute.

[191] Secondly, if any verification exercise is required to establish that the publisher or journalist has acted responsibly, it should not be burdensome or time consuming such that the urgency of the story is lost. As news is a perishable commodity as recognised in *Reynolds*, the urgency of a story is a factor to be taken into account especially in respect of an on-going story of public interest. It would unreasonable to expect a newspaper to undertake a verification exercise with independent experts or engage its own experts before publishing a developing story of daily interest.

[192] In the present case, the whole story about the fears arising from the plaintiff's gold mining activities was already in the public consciousness. The evidence disclosed that since 1996, there were at least 26 news articles from various news media which reported the use of cyanide by the plaintiff. So, to now impose a burden on the media to engage independent experts prior to publication would not just be an onerous undertaking but also impractical as the function of the media is to report the news as it unfolds.

[193] In this context, it is pertinent to recall what was stated earlier — 'in deciding whether or not the criterion of responsible journalism has been met, the court should apply the standard of conduct expected of a journalist in a practical and flexible manner' (see *Jameel* at [140]). Further, the *Reynolds* ten points were not intended to present an onerous obstacle to the media in the discharge of their functions (see *Charman* at [66]).

[194] In my judgment, the Court of Appeal's decision in rejecting the *Reynolds* privilege and defence of reportage on the ground that independent verification from experts should have been sought to verify the truth of the Bukit Koman residents' complaints before publishing the story was, with respect, inimical to the spirit of the *Reynolds* ten points. It is worth repeating that the ten points ought not to be treated as ten hurdles to be surmounted failing which the defence will fail. In the circumstances, the Court of Appeal, with respect, was wrong to interfere with the findings of the High Court with respect to the second and third articles together with the related videos.

Tone and adoption of the articles and videos

[195] The Court of Appeal came to the view that the articles in question were 'not fair and neutral' with the defendants 'garnishing and embellishing the allegations' and that it was couched in a 'sarcastic' or 'in an accusatory and damaging tone'. The court then concluded that the defendants have 'embraced and adopted' the complaints as the truth.

[196] However, upon a plain reading of the impugned articles themselves and the tone adopted therein, not even the most magnanimous exercise of the

imagination can justify the interpretation given by the Court of Appeal. The court probably fell into error by adopting the plaintiff's description and interpretation of how the articles were injurious to them. It is trite law that allegedly defamatory words are to be objectively assessed and not through the eyes of the complaining plaintiff or the meaning the plaintiff gives to the words (see *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720; [2019] 3 CLJ 729 at para [45]).

[197] In any case, as a matter of law, the tone of an impugned publication (as per *Reynolds* point no 9) need not be 'bland and arid' but that it could be written 'vigorously' (see *Roberts*, at [74]). A reportage defence is not lost even if a defendant publisher takes a perceptible pleasure in reporting the controversy or appears to sympathise with the case put forward by one party (see *Prince Radu* at [19]). The reportage defence is only lost by embellishment by the journalist adding his own comments to give truth to the story (see *Anwar v NST* and *Datuk Harris Salleh*)

[198] The Court of Appeal, in arriving at its decision, also commented on the impugned Articles asserting something sinister and also being biased against the plaintiff. On this score, the trial court had found no malice on the part of the defendants. There appeared to be no reversal of this finding on appeal. In any case, it is doubtful whether a sinister motive or malice is relevant in the case of the defence of reportage (see *Loutchansky v Times Newspapers Ltd and others (Nos 4 and 5); Loutchansky v Times Newspapers Ltd (Nos 2, 3 and 5)* [2002] QB 783 at [34]). So, with respect, the Court of Appeal's conclusion in this respect is unsustainable both in law and fact.

CONCLUSION

[199] For all the cumulative reasons mentioned in the analysis above, the Court of Appeal plainly erred in its approach and in the reasons it gave for differing from the trial judge and in setting aside the High Court decision. In my judgment, the High Court was entitled to come to the finding that in respect of the first article, responsible journalism had been established and in respect of the second and third articles and the related videos, the defendants were entitled to avail themselves to the defence of reportage. The impugned articles and videos, although damaging to the plaintiff, were on a matter of great public concern, were balanced in content and tone, and critically, did not assert the truth of the allegations reported.

[200] It is apposite to reflect that the High Court had a considerable advantage of having heard all the evidence through various witnesses over a period of time compared to the Court of Appeal which only had the benefit of the cold print of the Appeal Records. In such a case, an appellate court ought to

only disagree with the trial judge's assessment unless he/she has misunderstood the evidence, taken into account irrelevant factors or failed to take into account relevant factors or reached a conclusion no reasonable judge would have reached (see *Jameel* at [36]). The upshot in the present case, based on the preceding analysis, is that there were really no grounds for appellate intervention both in law and fact.

[201] As a parting rejoinder, it must be said, and this is beyond dispute, that the press and the journalists play a crucial role in reporting matters of public interest and matters of serious public concern. In its role as a watchdog for the people, the awareness created by such media reports will by and large lead to greater protection of society as a whole. In carrying out this duty, the press may at times get the facts wrong. However, in matters of public interest, so long as the press hold a reasonable belief that the publication is in the public interest or that the publication is a fair, accurate and impartial account of a dispute, the press and journalists are entitled to the protection of the law.

[202] A more emphatic pronouncement in this respect was made by Lord Nicholls in *Reynolds* which is worth repeating (at p 205):

> Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog.
>
> The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.

[203] Applying the legal issues as adumbrated above to the established facts, the leave questions as set out at the outset should be answered as follows:

Question 1: No.

Question 2: No.

Question 3: No.

Question 4: Yes.

Question 5: Yes.

Question 6: No.

Question 7: Yes.

Questions 8 and 9 need not be answered as they have become redundant in view of the answers to questions 1–7.

[204] My learned brother Vernon Ong Lam Kiat FCJ has read this judgment in draft and has expressed agreement with it. In the result, the appeal is allowed with costs to the appellants. The orders of the Court of Appeal are hereby set aside and the orders of the High Court restored.

Appeal dismissed and COA's decision affirmed.

Reported by Ashok Kumar